Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No.____

In re: HAL TAYLOR,

Debtor.

STEPHEN W. RUPP, TRUSTEE,

Petitioner,

v.

JULIA TAYLOR,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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91 pp

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit went beyond the limits and abused the powers of appellate review.

Whether the United States Court of Appeals for the Tenth Circuit erred as a matter of law in concluding that the determination of equitable property interests is a conclusion of law rather than an issue of fact.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court below were: Stephen W. Rupp, Trustee of the bankruptcy estate of Hal Taylor; and Julia Taylor, Mr. Hal Taylor's non-debtor spouse.

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PETITION FOR A WRIT OF CERTIORARI

Stephen W. Rupp, Trustee, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App.1a) is reported at 133 F.3d 1336 (10th Cir. 1998). The Order denying the Petitioner's request for rehearing is unreported. (App.17a). The memorandum decision of the United States District Court for the District of Utah, Central Division, summarily affirming the judgment of the bankruptcy court is unreported (App.19a). The Findings of Fact and Conclusions of Law and Judgment of the United States Bankruptcy Court for the District of Utah, Central Division, (App. 21a and App. 56a) are unreported.

JURISDICTION

The Court of appeals entered its judgment on January 12, 1998. The petitioner filed a request for rehearing and suggestion for rehearing in banc on January 23, 1998. The order of the United States Court of Appeals for the Tenth Circuit (hereafter "Court of Appeals") denying the request and suggestion was filed February 20, 1998 (App.17a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

Section 541 of the Bankruptcy Code, 11 U.S.C. § 541, provides in pertinent part,

> (a) The commencement of a case under...this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1)...[A]ll legal or equitable interests of the debtor in property as of the commencement of the case.

RULES INVOLVED

Federal Rule of Civil Procedure 52(a) and Federal Rule of Bankruptcy Procedure 8013 provide in pertinent part,

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

STATEMENT

Introduction

The bankruptcy estate includes all legal and equitable property interests of the debtor. Property interests are determine by state law. The issues concerning equitable property interests in the bankruptcy arena in the District of Utah are important, but still unsettled and not well defined due to the paucity of case law.

The underlying issue in this case is whether the debtor, Hal Taylor, has an equitable property interest in his home and residence of 21 years. Unfortunately, however, the overriding issue in this appeal has become the propriety of the

appellate review by the United States Court of Appeals for the Tenth Circuit, and its reversal of the U.s. Bankruptcy Court and the United States District Court. The petitioner seeks a determination that the Court of Appeals erred as a matter of law. More important, the petitioner asserts that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Background

In November, 1973, Hal Taylor (referred to by the Court of Appeals as "Harold") and Julia Taylor, husband and wife purchased their home in Park City, Utah. The title to the property was taken by the Taylors as joint tenants with the right of survivorship. (App. 26a).

Mr. Taylor was the primary income earner during the earlier years of the marriage. (App.23a, 26a). He has always been a source of income, through not always an income greater than his wife's in the last few years just prior to the filing of his bankruptcy petition. (App. 22a-26a).

At all times, the Taylors have treated their marriage as a financial partnership and considered income earned by either spouse as familial and partnership funds. The Taylors' incomes and receipts have been commingled. (App. 24a-26a).

Mr. Taylor is a real estate broker by profession. He has had a real estate business and real estate holders. Mr. Taylor is sophisticated and understands real estate transactions, including the nature of equitable, as opposed to legal, interests in property. (App. 22a, 25a).

Mr. Taylor had a heart attack in 1982. (App. 26a).

Mr. Taylor was sued in 1983. The suit resulted in judgment after a trial in July, 1986. The judgment was eventually satisfied. (App. 27a).

In May, 1985, Mr. Taylor transferred his title to the home to Julia Taylor. (App. 27a). Despite the transfer of title, Mr. and Mrs.. Taylors' care, use, enjoyment, possession, control and treatment of the property did not change. The Taylors treated the home as their joint property and their family home throughout their marriage. (App. 28a). There was also subsequent joint borrowing and repayment of a loan secured by the home for familial purposes. (App. 28a).

The Taylors stated no more reason or explanation for the transfer of the title than estate and inheritance tax planning. (App. 27a).

From 1986 to 1989, Mr. Taylor served as mayor of Park City, Utah. (App. 23a). Mr. Taylor suffered a stroke in 1989. (App. 24a).

On account of one judgment creditor, Mr. Taylor voluntarily filed a Chapter 7 bankruptcy on July 15, 1992. (App. 29a, 30a).

Just days before filing his bankruptcy petition, Mr. Taylor, contrary to a Utah State Court order, transferred, by trade-in, his joint interest in an unencumbered 1990 Jeep Wagoneer (App. 30a). The Taylors received a credit of $11,487.00 for the purchase of a 1993 Jeep Grand Cherokee. The title to the Grand Cherokee was placed solely in the name

of Julia Taylor. This transfer was undisclosed by Mr. Taylor in his bankruptcy. (App. 30a-32a).

Mr. Taylor disclosed virtually no assets upon filing. (App. 30a).

The Trustee contested Mr. Taylor's entitlement to a discharge in bankruptcy. After full prosecution of an adversary proceeding and full trial of the matter before the Honorable Judith A. Boulden, bankruptcy judge, District of Utah, Mr. Taylor was denied a discharge under § 727 of the Bankruptcy Code for willful and fraudulent omissions of material information from his bankruptcy statement of financial affairs and schedules. (App. 2a).

The Trustee subsequently commenced an adversary proceeding before the same bankruptcy judge against Julia Taylor to assert an equitable one-half property interest in the Taylors' home. After full prosecution and trial of the adversary proceeding, the bankruptcy judge declared that Mr. Taylor had an equitable one-half interest in the Park City home and imposed protective and remedial trusts. (App. 2a, 3a, 21a-50a).

Though Julia Taylor appealed the decision of the bankruptcy court and affirmation of U.S. District Court, she never included in the record on appeal to the Court of Appeals any of the evidence, oral or documentary, presented to the bankruptcy court. (App. 19a, 20A,10a).

Ms. Taylor appealed to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals stated that the bankruptcy court's finding that Mr. Taylor retained an equitable one-half interest was not a question of fact, but

a legal conclusion that would be reviewed de novo. (App.10a). Even so, the Court of Appeals reversed the lower courts by finding that certain facts and circumstances of the case did not meet a clear and convincing standard of factual proof. (App. 11a-16a).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN ORDER TO REVIEW AND REVERSE THE LOWER COURTS' RULINGS

If the determination of equitable property interests is an issue of fact, the Court of Appeals was precluded from reversing the lower court's findings and declaration of an equitable interest since the appellant did not include for review in the record on appeal any of the oral or documentary evidence considered by the trial court.

In order to step around this otherwise dispositive defect of the appeal, the Court of Appeals misstates the rule of law, "we believe the bankruptcy judge's finding that Harold retained an equitable undivided one-half interest in the home is not a fact finding but a legal conclusion that we review de novo." (App. 10a). This is a misstatement of the law and in error for the following reasons:

1) The determination of equitable property interests is an issue of fact. The very essence of the term "equitable" necessitates the assessment of facts and circumstances. Though simplistic, *Black's Law Dictionary*, p. 632 (1968) defines "equitable" as, "Just, fair, and right, in consideration of the facts and circumstances of the individual case."

2) The Court of Appeals never explains what the issue or test of law is that would allow a court to legally conclude, apart from the facts, that Hal Taylor did or did not have an equitable interest. The Court of Appeals does state that the bankruptcy court cannot adopt a per se rule, but that statement begs the question, turning the issue against to one of fact. The petitioner contends that the lack of explanation is because the determination of whether one has an equitable interest in property is truly and wholly or primarily factual in nature.

3) In sole support of this statement of the law, the Court of Appeals relies on *Jobin v. McKay, (In re M & L Business Machine Co., Inc.)*, 84 F. 3d 1330, 1338 (10th Cir. 1996) which case had absolutely nothing to do with the issues and no similarity to the facts of the subject case. The Court of Appeals chose to quote only one sentence of *Jobin*:

> Resolution of this issue requires a determination of whether the facts satisfy the proper legal standard, a mixed question of law and fact. (App. 10a).

However, in full context, the *Jobir* opinion goes on to state, "In these circumstances, because the question of good faith is primarily factual, we will review the findings of the bankruptcy court for clear error." The Court of Appeals in the present case omitted both this sentence from its quote and such an evaluation. The Court of Appeals considers no more, refers to no other support for, and makes no further explanation of its conclusion. The Court of Appeals did not acknowledge any factual component in the determination of a equitable property interest. This conclusion, though in error, was reached by the Court of Appeals to justify and

permit its "review de novo" and reversal of the lower courts, a review which it could not have made had the issue been one of fact, since the appellant did not include in the record on appeal any of the evidence considered by the Bankruptcy Court.

II. THE COURT OF APPEALS WENT BEYOND THE LIMITS AND ABUSED THE POWERS OF APPELLATE REVIEW.

Introduction

The key issue in this case is whether Hal Taylor had an equitable property interest in his home. The whole case, including the imposition of the trust, turns on this issue. Since the evidence considered by the trial court was not of record on appeal, the Court of Appeals concluded it could review the case de novo because the finding and declaration of an equitable property interest was not an issue of fact but rather a conclusion of law. Despite this conclusion, the Court of Appeal's opinion moves on to raise and consider issues of, reweigh and introduce facts. Ultimately, the Court of Appeals reverses by finding that certain selected facts did not meet a clear and convincing standard of proof. If the key issue were truly one of law rather than an issue of fact, there would have been no need to consider facts or standards of proof. The very opinion belies its conclusion, correctness and result.

(A)

The Court of Appeals Introduced and Found Facts Not at Issue and Concerning Which No Evidence Was Ever Presented.

Not until review of the opinion, did it become evident that the Court of Appeals introduced, considered or found facts not at issue and concerning which no evidence had ever been presented.

The Court of Appeals was much more concerned with issues of estate and tax planning than the issues of the law and facts of the case. Matters of estate and inheritance tax planning, however, were never the subject of nor issues in this case or appeal.

Estate and inheritance tax planning was stated by the Taylors as the reason for the transfer of Mr. Taylor's title to the home. The preoccupation of the Court of Appeals with the irrelevant issues of estate and inheritance tax planning is evident in the opinion's statement, "As a practical matter such a rule would prevent transfers of title to the home between spouses to accomplish such objective as avoiding probate and arranging the two estates to take advantage of the estate and inheritance tax laws exemptions." (App. 12a, 13a). This statement is an unsupported finding of fact by the Court of Appeals concerning matters never placed at issue in this case and concerning which no evidence was ever presented.

The Court of Appeals also states this finding of fact, "but any financial institution loaning money on the security of a home would require a consent or guarantee by a spouse of the title holder because of the spousal elective share and

homestead exemptions law." (App. 15a). From the experience of the Trustee, not only is such a statement not true and dated, but again, there is no evidence nor issue of such matter ever presented.

The Court of Appeals inappropriately considered and found facts not at issue or concerning which no evidence was ever presented.

(B)

The Court of Appeals Overlooked and Underweighed Findings of the Trial Court

(1)

The Opinion Ignores the Finding of Marital Property

For an unexplained reason, the Court of Appeals overlooked findings by the trial court, which standing alone were dispositive of the issues in this case. The most important of these findings concerns marital property.

The Court of appeals quoted the bankruptcy court, "The Taylors treated the Park City Home as their joint marital property and their family home throughout their marriage, both before and after (Harold) transferred legal title to the property to (Julia)". (App. 9a). That quote is the first and last time the opinion mentions or considers the finding and conclusion by the trial court.

While Utah is not a community property state, it is a marital property and equitable division state. Marital

property interests in Utah are clear and have been well defined. "Marital property is ordinarily all property acquired during marriage and it 'encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived.'". Each spouse is presumed to have equal claim and ownership of the marital property. *Dunn v. Dunn*, 802 P.2d 1314, 1318, 1323 (Utah App. 1990) which also cites *Maxwell v. Maxwell*, 754 P.2d 84, 86-87, (Utah App. 1990) (absent special circumstances, property accumulated by the parties during the marriage should be equally divided.)

The Utah courts have considered spouses to be "partner[s] in the 'business' of marriage" and that all efforts or contributions to the marriage, whether income producing or not, justify and entitle each spouse to a fair share of the martial assets. *Dunn v. Dunn, supra* at p. 1318. The Utah Supreme Court has also stated:

> The state of title to marital property prior to divorce decree is not necessarily binding on the trial court in its distribution of such property pursuant to such decree. The trial court is empowered to make such distributions as are just and equitable, and may compel such conveyances as are necessary to that end. *Workman v. Workman*, 652 P.2d 931 (Utah, 1982).

The presumption of equal marital property interests survives even when title to the property has been previously and purposely transferred from one spouse to the other. See *Hoagland v. Hoagland*, 852 P.2d 1025 (Utah App. 1993) referring also to *Hogue v. Hogue*, 831 P.2d 120 (Utah App.

1992). In these cases, the husbands had transferred title to their wives to avoid creditors. Such reason is no more or less substantive than transferring title for estate and inheritance tax planning. Both are transfers of title for reasons or purposes besides actual transfer of the property. Furthermore, due to the fact that the Taylors' home was held in joint tenancy, the Court of Appeals admitted that the Taylors' purported reason for the transfer was not "a model of legal reasoning". (App. 12a).

The trial court found that the Taylors' home was marital, joint and family property in which Harold had a one-half interest, regardless of title, since the property was acquired during the marriage among all the other factors considered by the trial court. This finding is dispositive, yet the Court of appeals disregarded the finding.

(2)

The Court of Appeals Has Ignored Findings That Constituted "Badges" of Ownership

The appellate court found, "There were no 'badges of fraud' in this case". (App. 15a). Implicit in this finding, as improper as it might be, is that even though the case does not involve fraud, the Court of Appeals recognized that "badges of fraud" might also be "badges" or indicia of equitable ownership. In both cases, intent must be determined. Just as the courts well understand that a culpable party is not going to admit wrongful intent, neither will Mr. Taylor admit ownership in a liquidation bankruptcy case voluntarily filed by him for the purposes of defeating a judgment creditor which he vowed would never be paid. For this reason, the courts well recognize that intent can be proven by

circumstantial and extrinsic evidence. Thus, the consideration of "badges" or indicia of intent. (App. 4a).

In this case, the Court of Appeals overlooked, ignored, failed to recognize, or underweighed several "badges", including the following:

(I) The transferee and opposing owner of the home is Julia, Harold's wife, an insider.

(ii) The transfer to and opposing ownership of Julia is of substantially all the assets of Harold or Julia. Harold has or disclosed little else. Harold has virtually nothing.

(iii) Harold received no or inadequate consideration for the transfer to Julia.

(iv) Harold continued to pay debt secured by and taxes and insurance on the home.

(v) Harold transferred title to Julia after he had been sued or threatened with suit.

(vi) Harold retained possession, use, enjoyment, or control of the property transferred after the transfer.

(Compare U.C.A. § 25-6-5-(2) cited in the opinion f the Court of Appeals (App. 4a).)

Depending on the facts of a case, a finding of only one or more of such badges may be sufficient to prove the requisite intent (App. 4a). But the Court of Appeals failed to

acknowledge most or any of these badges of fraud or ownership.

(3)

The Court of Appeals Underweighed The Indicia of Ownership

The last above noted "badge" is considered in the opinion, but grossly underweighed by the Court of Appeals, notwithstanding that the weight of evidence is the domain of the trial court and beyond appellate review. The Court of Appeals underweighs this finding for the following reasons:

First, the opinion discounts the behavior of ownership. In any particular case, the owner's behavior prior to a transfer may be viewed to determine what behavior manifested ownership by that particular owner. If the owner's behavior does not change after an alleged transfer, the behavior should be considered to continue to manifest ownership despite the mere change of a name on a title. "If the debtor continues to use, enjoy and control the property transferred as if the property remained his own, then he retains a beneficial interest in the property." *In re Howard*, 55 B.R. 580, 584 (Bankr. E.D. No. Car. 1985).

Second, the badge of continued control and possession of property has particular significance and definition in Utah due to prior laws. Section 25-1-14 of the Utah Fraudulent Conveyance Act, repealed upon the adoption of the Uniform Fraudulent Transfer Act, in 1988, provided in pertinent part as follows:

> Every sale made by a seller of goods or chattels in his possession or under his control, and every assignment of goods and chattels, unless the same is accompanied by a delivery within a reasonable time, and is followed by an actual and continued change of the possession of the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the seller or assignor, or subsequent purchasers in good faith. The word 'creditors' as used in this section shall be construed to include all persons who shall be creditors of a seller or assignor at anytime while such goods and chattels shall remain in his possession or under his control.

Though this statutory expression of this "badge" has been repealed with the adoption of the Utah Fraudulent Transfer Act, the substance of this section is still a badge of fraud and still statutorily implied in U.C.A. § 25-6-5(2)(b) of the Utah Fraudulent Transfer Act. ("(b) the debtor retained possession or control of the property transferred after the transfer.)

Under prior Utah law, continued possession or control of property was alone "conclusive evidence of fraud" against any party which became a creditor of the debtor while in possession or control of the property.

Third, under Utah law, possession is sufficient to give inquiry notice of a real property interest not of record. *Patel v. Rupp*, 195 B.R. 779 (D.Utah 1996), *In re Granada*, 92 B.R. 501 (Bankr. D.Utah 1988).

The trial court, after considering all the evidence, specifically found that the debtor's possession, control, use and enjoyment of the property was the same both before and after the alleged transfer. In Utah, this finding is alone sufficient to support the determination of an equitable interest.

(4)

The Opinion Has Leapfrogged The Declaration of Equitable Interest

By over-analyzing and narrowing its focus on the resulting and constructive trusts, the Court of Appeals avoided the true heart of this case which is whether the bankruptcy court properly declared an equitable interest in the Park City home. In this case, the impositions of the trusts are equitable remedies applied after a determination that a claim or cause is just. The imposition of the trusts is dependent on the finding that Hal Taylor had an equitable interest in his home. It is not whether the trusts apply that determines whether there is an equitable interest. The issue is whether there is an equitable interest that the trusts can be imposed to protect. *See, Enrody v. Enrody*, 914 P.2d 1166 (Utah App. 1996) (the court awarded Ms. Endrody an equitable share of her husband's beneficiary interest in a trust through the imposition of a constructive trust.) Even should a court determine that the impositions of the trusts are not appropriate remedies, and do not apply, such determination should have no bearing on the declaration of an equitable interest.

(5)

The Court of Appeals Misapprehends the Policy at Stake in this Case.

The status of legal title to property for estate and tax planning is not at issue in this case. The Policy at issue is the avoidance of creditors through the manipulation of legal title.

The Court of Appeals was overly concerned that affirming the bankruptcy court's decision would impair estate and tax planning, a matter that was never an issue in the case. There was no evidence of such impairment. Furthermore, what may not be factually sufficient for one purpose, may be legally for another. The sufficiency or jeopardy of an act lies of the context in which the circumstances are viewed. There is no evidence that retention of a beneficial or equitable ownership will jeopardize a transaction that can be accomplished by mere transfer of legal title.

On the other hand, there is the policy of preventing schemes or devices whereby a debtor can avoid his creditors and place his properties out of reach. That is the policy which is the subject of this case. The policy of Utah is to prevent a person from using a "device by which he can retain for himself and enjoy substantially all of the advantages of ownership and at the same time, place it beyond the legitimate claims of his creditors." *Leach v. Anderson*, 535 P.2d 1241 (Utah 1975). The Court of Appeals has sanctioned just such a device. There is no issue of fact but that Mr. Taylor controls, enjoys, uses and possesses the Park City home just as if he were the owner. There is no question that the home is joint marital property. While enjoying all the benefits of ownership, the Court of Appeals permits Mr. Taylor to place

the property beyond the reach of his creditors. This is not just. This is not good policy.

(C)

The Court of Appeals Denied The Trustee Due Process By Considering Issues of Law or Fact Not Presented or Supported on Appeal

As set forth in the arguments above, not until the Court of Appeals issued its opinion did the petitioner become aware of the Court of Appeals' agenda of issues of law and fact. The Trustee never had notice nor opportunity to address or respond to the new issues. When this was raised in the Trustee's motion for reconsideration, the motion was denied summarily without explanation. The opinion of the Court of Appeals raised for the first time the following issues:

1) Whether the determination of an equitable property interest is an issue of fact or a conclusion of law.

2) Whether the Bankruptcy Court was attempting to impose or adopt a per se rule.

3) Whether the finding of an equitable property interest of a debtor in bankruptcy would "prevent transfers of title to the home between spouses to accomplish such objectives as avoiding probate and arranging the two estates to take advantage of the estate and inheritance tax laws exemptions."

4) Whether financial institutions "loaning money on the security of a home would require a consent or guarantee by a spouse of the title holder because of

the spousal elective share and homestead exemptions law."

5) Whether the appellee would need to argue and rehabilitate facts and findings of the trial court since the appellant did not include in the record on appeal any of the oral or documentary evidence considered by the trial court.

As to each of these issues, the Court of Appeals became an unopposed advocate, witness, judge and jury. The issues were not raised nor supported on appeal by the appellant. The Trustee had no notice nor opportunity to respond.

(D)

The Court of Appeals Violated Fundamental Rules of Appellate Review

The Court of Appeals violated fundamental rules of appellate review.

1) Rule 52(a) of the Federal Rules of Civil Procedure states that:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness.

The Court of Appeals could not consider or set aside findings of fact of the trial court because it had no record from which

it could determine that the findings of fact were clearly erroneous and unsupported. Nevertheless, the Court of Appeals set aside findings of fact and reweighed the evidence.

2) The Court of Appeals violated the rule that the record on appeal must include the evidence in order to review the factual findings of the court below. *United States v. Davis*, 60 F.3d 1479, 1481 (10th Cir. 1995).

3) The Court of Appeals did not review the findings of fact of the trial court in a light most favorable to the prevailing party below; namely, the Trustee. To the contrary, the Court of Appeals ignored many of the findings and reweighed the evidence in favor of the appellant. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

CONCLUSION

The Supreme Court should grant this petition for a writ of certiorari for the following reasons:

(1) The determination of an equitable property interest is an issue of fact, not a conclusion of law. The Court of Appeals erred in concluding otherwise.

(2) Because the appellant did not include the evidence presented to the bankruptcy court in the record on appeal, the review and reversal of the bankruptcy court's finding of an equitable interest by the Court of Appeals is a departure from the accepted and usual course of judicial proceedings and contrary to the rules and limits of appellate review.

(3) The Court of Appeals deprived the petitioner of due process.

Respectfully submitted,

/S/ Stephen W. Rupp
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May 15, 1998

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

Jan. 12, 1998
Patrick Fisher
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re: HAL TAYLOR,	)	
	)	
Debtor.	)	
----------	)	No. 96-4100
JULIA W. TAYLOR,	)	
	)	
Appellant,	)	
	)	
V.	)	
	)	
STEPHEN W. KUPP, Trustee,	)	
	)	
Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 95-CV-961-C)

J. Kent Holland and Brenda Flanders of Anderson & Holland, Salt Lake City, Utah, for Appellant.

Jeffrey E. Nelson of Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Appellee.

Before MURPHY and LOGAN, Circuit Judges, and MILES-LaGRANGE, District Judge.*

LOGAN, Circuit Judge.

Julia W. Taylor (Julia) appeals the district court's judgment imposing a trust for the benefit of creditors upon real and personal property titled in her name. In an earlier proceeding, her husband, Harold Taylor (Harold), was denied discharge in bankruptcy on the basis that he had willfully and fraudulently omitted material information from his statements and schedules. Steven W. Rupp, bankruptcy trustee, then brought this proceeding against Julia, claiming that Harold's transfers to Julia of the assets at issue here were void or voidable as fraudulent conveyances or, in the alternative, that Harold had equitable interests in them such that the court should impose a constructive or resulting trust.

The bankruptcy judge determined that Harold retained a one-half equitable interest in the couple's Park City home even though he had conveyed his share of a joint tenancy title to Julia seven years before when he was solvent, and that this equitable interest was part of Harold's bankruptcy estate. The judge imposed a resulting and constructive trust for the benefit of creditors on an undivided one-half interest in the home. The judge also determined that the bankruptcy estate

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* The Honorable Vicki Miles-LaGrange, United States District Judge for the Western District of Oklahoma, sitting by designation.

was entitled to a money judgment against Julia for $5,743.50, one-half the allowance for a jointly owned Jeep the couple traded in on another, which they titled in Julia's name alone, about two weeks before Harold filed bankruptcy. The district court summarily affirmed.[1] Julia has appealed both determinations.

I

We have no problem affirming the judgment respecting the Jeep transaction. In 1991 the Taylors purchased a 1990 Jeep and titled it jointly. In June 1992, seventeen days before Harold filed for bankruptcy, they traded that Jeep in as partial payment, receiving $11,487 credit, for a new 1993 Jeep Grand Cherokee titled only to Julia.

Under both the Uniform Fraudulent Transfer Act, Utah Code Ann. §§ 25-6-1 through - 13 (1988), and the Bankruptcy Code, I I U.S.C. § 548(a)(1), when a person has transferred his assets with actual intent to hinder, delay or defraud his creditors, such a transfer can be avoided. Whether the trustee must show actual fraud by a clear and convincing standard, see, e.g., Glinka v. Bank of Vermont (In re Kelton Motors, Inc.), 130 B.R. 170, 179 (Bankr. D. Vt. 1991), or only by a preponderance of the evidence, see Thompson v. Jonovich (In re Food & Fibre Protection, Ltd.), 168 B.R. 408, 418

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[1] Because the district court simply adopted the bankruptcy judge's findings and conclusions, throughout this opinion we refer to the bankruptcy judge's decision as the judgment being reviewed.

(Bankr. D. Az. 1994), we need not decide because, as the court found, the trustee's evidence met the higher standard.

The Uniform Fraudulent Transfer Act includes a nonexclusive list of "badges of fraud" that may be considered as actual evidence of a debtor's intent to defraud. The factors are:

(a) the transfer or obligation was to an insider;

(b) the debtor retained possession or control of the property transferred after the transfer;

(c) the transfer or obligation was disclosed or concealed;

(d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(e) the transfer was of substantially all the debtor's assets;

(f) the debtor absconded;

(g) The debtor removed or concealed assets;

(h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incur-red;

(i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Utah Code Ann. § 25-6-5(2) (1988). When one or more of these badges are present fraudulent intent can be inferred. Likewise, under 11 U.S.C. § 548(a)(1) bankruptcy courts

consider similar badges of fraud as evidence of actual fraudulent intent. See Max Sugarman Funeral Homes, Inc. v. A.D.B. Investors, 926 F.2d 1248, 1254 (1st Cir. 1991).

As the bankruptcy judge pointed out, in this case there are several badges of fraud. Harold transferred his half interest in the 1990 Jeep to an insider, his wife, two weeks before declaring himself insolvent. In his bankruptcy filing, Harold listed Lynn Knight as his only creditor. Knight had sued Harold in June 1990 in relation to a real estate transaction, and received a $36,879 judgment against him, on which she had pursued a writ of execution in December 1991. The Jeep title transfer occurred after that judgment and only a few days before Harold's filing as a bankrupt. Further, Harold concealed the transfer when he did not disclose it in his statement of financial affairs or list it as an asset in his schedule when he took bankruptcy.

Julia claims that the 1990 Jeep was improperly titled, that it had been purchased with a trade-in from a vehicle which should have been titled in her name, and that the two were merely correcting this error when they purchased the 1993 Jeep. The bankruptcy judge rejected these arguments and also Julia's argument that she used her money to purchase both of the vehicles. The record supports the bankruptcy judge's determination on this issue.

II

A

We have much more difficulty with the findings and conclusions respecting the real estate transfer.

Harold and Julia Taylor purchased their Park City home in November 1973 for approximately $70,000, which they financed by paying $14,000 down and taking a mortgage of approximately $56,000. They took title to the home in joint tenancy. In 1982 Harold suffered a heart attack. In May 1985 he executed and recorded a warranty deed conveying his interest in the home to Julia, so that thereafter it was titled solely in her name. Shortly after the 1985 conveyance to Julia they retired the remaining $25,000 mortgage, with funds which the bankruptcy judge stated "may have come from an inheritance received by" Julia. Appellant's App. 26.[2]

The bankruptcy judge found that until 1985 Harold's income from his real estate business was the primary source for the mortgage payments. The court also found that, although until around 1985 Harold earned a much higher income than Julia, they treated the marriage as a financial partnership and considered income earned by either spouse as part of their joint family funds. Both continued living in the home, sharing the expenses of taxes, utilities, and insurance--with many payments made by checks signed by Harold.

From 1986 to 1989 Harold's income from his real estate business declined dramatically, partly because he was serving as mayor of Park City. During this time Julia's income increased. In 1989 Harold suffered a stroke and ceased earning any income. He began receiving social security benefits in 1992. In March 1989, the Taylors cosigned

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[2] The trustee's complaint appears to acknowledge that Julia paid off the mortgage. App. of Plaintiff/Appellee at 3.

a $60,000 line of credit secured by the Park City home and utilized at least $29,000 of this line of credit for living expenses. Harold did not include any equitable interest in the Park City home in his schedule of assets filed in the bankruptcy proceeding.

B

Julia first argues that the statute of limitations barred the trustee's equitable claims against the Park City home. The trustee filed suit in March 1994. The applicable Utah statute of limitations on equitable claims is four years. See Utah Code Annotated § 78-12-25(3) (four-year statute of limitations on actions "for relief not otherwise provided for by law"); see also American Tierra Corp. v. City of West Jordan, 840 P.2d 757, 760-61 (Utah 1992) (applying § 78-12-25(3) to equity action). The bankruptcy judge determined that the four-year statute began to run in July 1992, when Harold filed his bankruptcy schedules and did not claim an equitable interest in the Park City home. She said this failure to list his equitable interest was the first time Harold took a position contrary to the equitable interest claimed by the plaintiffs. See Carnesecca v. Carnesecca, 572 P.2d 708, 711 (Utah 1977). Julia counters that the statute began to run when Harold transferred his interest and recorded the deed in May 1985. She quotes from Baker v. Patee, 684 P.2d 632 (Utah 1984), that "[n]o resulting trust could come into being, as the plaintiff did not prove that [the grantor] intended anything but an unconditional conveyance of her property. . .. The date of delivery of the deed set the period of limitations in motion and those actions were barred years before [the grantor's] death." Id, at 638.

In Baker, the Utah Supreme Court affirmed the district court's decision because it found that the evidence did not support a resulting trust. "Had [a resulting trust] been the finding in the instant case, the statute of limitations would not begin to run until the trustees affirmatively repudiated the trust. Therefore this action would not be barred." 684 P.2d at 635 (citing Parks v. Zions First Nat'l Bank, 673 P.2d 590 (Utah 1983)). Baker indicates that the statute of limitations is intertwined with the substantive question whether Harold had an equitable interest in the home. If the bankruptcy judge correctly determined that Harold retained an equitable interest, under Utah law the statute of limitations would not have run until he took an action to repudiate that interest when he filed his bankruptcy schedules. If, however, Harold did not retain any equitable interest, then the trustee would not be entitled to recover in any event. We thus must review the merits of the case.

C

The bankruptcy judge's opinion imposed "both a resulting trust . . . and a constructive trust" on the undivided one-half equitable interest she found Harold to own in the Park City home titled in Julia's name. The judge reasoned as follows:

> [Harold] Taylor had an equitable interest in the Park City Home at the time he transferred legal title to [Julia] and he continued to have an equitable interest in the property up to and through the time his bankruptcy petition was filed. [Harold's] equitable interest is evidenced by his original purchase of the Park City Home in 1973 and his continuing payments on

the underlying mortgage debt. The Park City Home was purchased and the transfer was made at times when [he] had substantial income. When the Taylors later obtained the $60,000 Line of Credit in March of 1989, both [Harold] and [Julia] were liable on the loan. Subsequently [Harold] made payments on the Line of Credit and paid taxes, insurance and utilities on the Park City Home.

The Taylors testified that they transferred legal title because of estate planning and inheritance tax concerns after [Harold's] heart attack.

> However, the fact that [Harold] never intended to convey the full beneficial interest in the Park City Home to [Julia] as a gift is evidenced by the Taylors' conduct after [Harold] transferred legal title to [Julia] in 1985. The Taylors treated the Park City Home as their joint marital property and their family home throughout their marriage, both before and after [Harold] transferred legal title to the property to [Julia].

Appellant's App. 49-50. The judge found, however, that there was no evidence Harold was insolvent when he transferred title to the Park City home to Julia or that the transfer was made in anticipation of litigation. Id, at 39. She found that Harold received "some consideration for the transfer because [Julia] paid off the $25,000 mortgage remaining . . . an obligation for which [Harold] would have been jointly liable." Id. The judge also found that Harold "is a real estate broker by profession and understands real estate transactions including the nature of equitable, as opposed to legal, interests in property." Id. at 22.

We may not set aside the bankruptcy judge's fact findings unless they are clearly erroneous. Fed. R. Civ. P. 52(a). The appellate record does not contain a transcript of the testimony presented to the judge. But the apparently undisputed testimony was that Harold intentionally transferred title to the home to Julia "because of estate planning and inheritance tax concerns after [Harold's] heart attack." Appellant's App. 49. Therefore, the judge's finding that Harold "intended" to retain an equitable one-half interest was the judge's inference from the other undisputed facts.

In these circumstances we believe the bankruptcy judge's finding that Harold retained an equitable undivided one-half interest in the home is not a fact finding but a legal conclusion that we review de novo. "Resolution of this issue requires a determination of whether the facts satisfy the proper legal standard, a mixed question of law and fact." Jobin v. McKay (In re M & L Business Machine Co., Inc.), 84 F.3d 1330, 1338 (10th Cir.), cert. denied, 117 S. Ct. 608 (1996). See Hall v. Vance, 887 F.2d 1041, 1043 (10th Cir. 1989) ("This court . . . may exercise de novo review over the bankruptcy court's conclusions of law.").

A bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. § 541(a)(1). The existence and extent of such an interest is determined by state law, in this case the law of Utah. See, e.g., United States v. Rodgers, 461 U.S. 677, 683, 690-91 (1983). The bankruptcy judge, in imposing both a resulting and constructive trust in favor of Harold which his creditors could reach relied principally upon Parks v. Zions First National Bank, 673 P.2d 590 (Utah 1983). We turn our attention

first to whether the bankruptcy judge correctly imposed a "resulting trust."

D

The Parks court indicated that a resulting trust requires an intent to retain. a beneficial interest, and cited Restatement (Second) of Trusts § 442 (1959) which provides that

> Where a transfer of property is made to one person and the purchase price is paid by another and the transferee is a wife, child or other natural object of bounty of the person by whom the purchase price is paid, a resulting trust does not arise unless the latter manifests an intention that the transferee should not have the beneficial in the property.

673 P.2d at 598 (quoting Restatement (Second) of Trusts § 442) (emphasis added). Restatement § 442 thus reverses the usual presumption that when one person provides the purchase money for property but another takes legal title to the property, it is intended that the legal owner holds the property for the benefit of the one providing the purchase price. The Parks court rejected a claim of resulting trust because it found no manifestation that the husband there intended to retain a beneficial interest in properties to which he contributed money and labor but which were titled in his wife's name.

In the instant case the bankruptcy judge found that Harold was a real estate broker who "understands real estate transactions." Appellant's App. 22. She acknowledged that the Taylors "testified that they transferred legal title because

of estate planning and inheritance tax concerns after [Harold's] heart attack." Id. at 49. Yet she found Harold never intended to convey the entire beneficial interest because of his later conduct: living on the premises, paying bills, cosigning a letter of credit. In reviewing this determination we must keep in mind that the proof required to impose a resulting trust "must be strong, clear, and convincing, such as to leave no doubt of the existence of the trust," Chambers v. Emery, 45 Pac. 192, 195 (Utah 1896), and that it is the intention "at the time of the transfer and not at some subsequent time which determines whether a resulting trust arises." Restatement (Second) of Trusts § 443 comment a. So viewed, there is no basis for the bankruptcy judge's determination that the facts rebut the presumption that when a husband pays (or here, signs over his interest) for property that is placed in his wife's name, he intends a gift. In fact, Harold's act of conveying his interest was more deliberate because he and Julia already held title to their home jointly. The Taylors' explanation--that Harold had seen his brother's widow experience difficulty selling a home that had been co-owned, that he had heart trouble and wanted to ensure Julia would have the home if he died--while perhaps not a model of legal reasoning must have been discounted for the judge to have reached her conclusion.

The bankruptcy judge appears to have adopted a per se rule that when a husband conveys to his wife his interest in the home but intends to continue to reside there and help pay real estate taxes, insurance, and other household bills that accrue, he intends to continue to hold a fifty percent beneficial interest in the property. As a practical matter such a rule would prevent transfers of title to the home between spouses to accomplish such objectives as avoiding probate and arranging the two estates to tale advantage of the estate and

inheritance tax laws exemptions. See 26 U.S.C. §§ 2001(c), 2010(a).

We are satisfied Harold's intention to continue to live with his wife on the premises and to pay a portion of the bills incurred during that occupancy does not establish clear and convincing proof of his intention to retain an ownership interest in property that he conveyed to his wife for estate planning purposes. Thus, we reject the bankruptcy judge's conclusions to the contrary.

E

We turn next to whether the bankruptcy judge correctly imposed a "constructive trust." "A constructive trust is imposed not because of the intention of the parties but because the person holding title to property would profit by a wrong or would be unjustly enriched if [s]he were permitted to keep the property. A constructive trust, unlike an express or resulting trust is remedial in character." Restatement (Second) of Trusts at 326.

The Parks court noted that constructive trusts are equitable remedies imposed for a variety of circumstances; "[a]n attempt to define or describe a constructive trust would be inadequate because such definition or description would be too narrow in its scope and fail to include important types of constructive trusts." 673 P.2d at 597 (quotation, citation, and footnote omitted). Nevertheless, the circumstances requiring imposition of a constructive trust must be found to exist by "clear and convincing evidence." Nielson v. Rasmussen, 558 P.2d 511, 513 (Utah 1976). We also must remember that we view the situation from Harold's position--not his creditor's--to determine whether it would be a wrong to Harold to let

Julia keep the property. The bankruptcy judge already had found Harold transferred the property while he was solvent and not in anticipation of litigation.

Appellant's App. 39. The trustee here stands in Harold's shoes in claiming ownership of an equitable half of the real estate.

Parks, heavily relied upon by the bankruptcy judge and the trustee, is quite distinguishable from the case before us. In Parks, a husband and wife accumulated significant real estate holdings and made improvements on them during a long-term marriage. The husband was employed throughout the marriage and the wife for the most part was not; they both contributed labor in maintaining and improving the properties. She did the bookkeeping and kept the accounts; and all of the property eventually was titled in her name alone. The wife died; her will left her husband only a conditional life estate in a farm house in which they had lived and a small monthly payment. These benefits terminated if he remarried. The will designated a children's hospital as the ultimate beneficiary of the testamentary trust assets. The husband did not elect against the will or otherwise timely challenge it, but obtained relief by the court's imposition of a constructive trust.

We read Parks as based on the Restatement of Restitution § 160 (1937) idea of unjust enrichment and as such it is imminently reasonable. The court there prevented an injustice by applying equitable remedies where no trust intent existed. In contrast, in the case before us the supposed equitable owner is the one who made the gift, and he manifested no intent that his wife not have the legal and

equitable title to the home. The fact that he paid real estate taxes, insurance and utility bills could certainly be seen as his contributing to the expenses in return for living in the home which she owned. Indeed, a Utah statute imposes on both husband and wife "[t]he expenses of the family," Utah Code Ann. § 30-2-9; many of these payments would surely fall into that category.

The bankruptcy court seemed to rely to some extent on the fact that Harold co-signed the line of credit; but any financial institution loaning money on the security of a home would require a consent or guarantee by a spouse of the title holder because of the spousal elective share and homestead exemptions law. See Utah Constitution, Art. XXII § 1, and Utah Code Ann. §§ 75-2-201, 75-2-202, 75-2-401, 78-23-3, 78-23-4. There were no "badges of fraud" in this case. At the time of the transfer the couple was solvent, and the district court found there was no indication that they were not paying their debts. In contrast, in Parks, a man who worked hard all his life and contributed quite substantially to the property that was accumulated in his wife's name would have been left with virtually nothing unless the court imposed a constructive trust on some of that property.

The bankruptcy judge applied Parks too broadly, adopting a per se rule that would effectively nullify any attempt by one spouse to transfer all right, title and interest in a home in which he or she continues to reside, at least if the grantor continues to pay any costs of the occupancy. We believe that is not the law of Utah. Parks should not be read to eviscerate such plans where a "breadwinning" spouse continues to live in a home owned solely by the other spouse. We found no other case remotely similar that imposed such a

trust.[3] We thus reverse the finding that Harold Taylor had an equitable one-half undivided share in the Park City property.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED for further proceedings consistent with this opinion.

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[3] The closest Utah case on the facts is Mattes v. Olearain, 759 P.2d 11 77 (Utah App. 1988), in which a plaintiff testified she conveyed title to real estate to another to avoid her former husband's creditors. The district court imposed a constructive trust in her favor. Reversing, the Utah Court of Appeals, quoting a Utah Supreme Court case, stated: "'Absent fraud, duress, mistake, or the like attributable to the grantee, a competent grantor will not be permitted to attack or impeach his own deed.' Plaintiff testified she signed the deed of her own will, free of fraud, trick, or threat. She alleged no mistake. As we find no basis to disregard plaintiffs deed . . . the award of the property to plaintiff is reversed." Id. at 1180.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: HAL TAYLOR,	)	
	)	
Debtor.	)	
	)	
	)	
JULIA W. TAYLOR,	)	
	)	
Appellant,	)	
	)	
V.	)	No. 96-4100
	)	
STEPHEN W. RUPP, Trustee,	)	
	)	
Appellee.	)	

ORDER
Filed February 20, 1998

Before MURPHY and LOGAN, Circuit Judges, and MILES-LaGRANGE, District Judge.*

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* The Honorable Vicki Miles-LaGrange, United States District Judge for the Western District of Oklahoma, sitting by designation.

Appellee's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER.
Clerk of Court

by:
Deputy Clerk

FILED
Clerk, U.S. District Court
22 May 96 AM 10:04
DISTRICT OF UTAH
By: /S/
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH
CENTRAL DIVISION

In re:	:	
HAL TAYLOR	:	
Debtor.	:	ORDER
STEPHEN W. RUPP,	:	Civil No. 2:95-CV-961C
Plaintiff/Appellee,	:	
vs.	:	
JULIA W. TAYLOR,	:	
Defendant/Appellant.	:	

This matter is an appeal from the bankruptcy court's findings and conclusions dated September 8, 1995. In that decision, the court found that appellant had an equitable interest in the Park City home that he lived in with his wife, and that a resulting trust and a constructive trust should be placed on that interest in favor of appellant's creditors. The

court also found that the transfer of appellant's ownership in an automobile to his wife was a fraudulent transfer intended to hinder, delay or defraud a. creditor. The court finds that the factual findings underlying these conclusions are adequately supported by the evidence, and that the bankruptcy court's analysis of the applicable law is correct in all respects. Accordingly, the decision of the bankruptcy court in this matter is affirmed, and this appeal is hereby dismissed.

IT IS SO ORDERED this 22 day of May, 1996.

BY THE COURT:

/S/
TENA CAMPBELL
United States District Judge

THIS ORDER/JUDGMENT
ENTERED
SEP 8 1995
DEPUTY CLERK
U.S. BANKRUPTCY COURT

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	:	
	:	
HAL TAYLOR,	:	Bankruptcy Number 92B-24610
	:	
Debtor.	:	[Chapter 7]
----------	:	
STEPHEN W. RUPP,	:	Adversary Proceeding Number
Trustee,	:	
	:	94PB-2090
Plaintiff,	:	
	:	
v.	:	
	:	
JULIA W. TAYLOR,	:	
	:	
Defendant.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an adversary proceeding in which the Chapter 7 Trustee asserts that certain transfers made by the debtor are fraudulent pursuant to Utah Code Ann. §§ 25-1-4

to 25-1-14 (1 984), §§ 25-6-1 to 25-6-13 (1988), and/or 11 U.S.C. § 548;[1] for declaration that the estate has an equitable undivided one-half interest in the transferred property; for imposition of a trust for the benefit of creditors; and to quiet title. The court heard the evidence and arguments of counsel, considered the credibility of the witnesses, made an independent analysis of applicable case law and considered post-trial memoranda filed by the parties. Now, being fully informed, the court hereby enters the following:

FINDINGS OF FACT

1. Stephen W. Rupp (Rupp) is the duly appointed, qualified, and acting Chapter 7 Trustee of this bankruptcy estate.

2. Harold W. Taylor (Taylor) is the debtor herein.

3. Taylor is married to Julia W. Taylor (J. Taylor), sometimes known as Judy Taylor (jointly the Taylors). The Taylors were married in May of 1973. The Taylors have a son, Cody Taylor (Cody), who was born in 1975.

4. Taylor is a real estate broker by profession and understands real estate transactions including the nature of equitable, as opposed to legal, interests in property. He conducted his business under the name of Hal Taylor & Associates.

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[1] Future references are to Title 11 of the United States Code unless otherwise noted.

5. For approximately 13 to 16 years during the early part of the Taylors' marriage, Taylor was the primary source of family income, with an income of approximately $5,000 to $6,000 per month.

6. J. Taylor always worked during their marriage. She conducted her business under the name of Judy Taylor Artworks. After Cody's birth, J. Taylor was not the primary source of income for the family until 1989.

7. The Taylors' 1985 joint tax return reflected adjusted gross income from Hal Taylor & Associates of $45,936, and gross income from Judy Taylor Artworks of $9,107.

8. From 1986 until 1989, Taylor served as mayor of Park City, Utah.

9. During his term as mayor, Taylor's real estate business became relatively inactive and his income declined. He was paid $12,000 per year as mayor and his net monthly income was approximately $600.

10. Because Taylor's income decreased, J. Taylor became more active in her art business in order to increase family income.

11. The Taylors' 1987 joint income tax return reflected adjusted gross income from Taylor's wages of $12,000, from Judy Taylor Artworks of $11,764, and from Hal Taylor & Associates of $11,608.

12. The Taylors' 1988 joint income tax return reflected adjusted gross income from Taylor's wages of $12,000,

from Judy Taylor Artworks of $12,565 and no income from Hal Taylor & Associates.

13. In March of 1989, the Taylors obtained a $60,000 home equity loan (Line of Credit) to supplement their income and, although the evidence is contradictory, generally used the funds for family expenses.

14. In May of 1989, Taylor suffered a stroke.

15. After Taylor's stroke J. Taylor became the primary source of income for the family.

16. The Taylors' 1989 joint income tax return showed adjusted gross income from Taylor's wages of $12,000, and from Judy Taylor Artworks of $16,802.

17. The Taylors' 1990 joint income tax return showed adjusted gross income from Judy Taylor Artworks of $21,053 and no income from Hal Taylor & Associates.

18. The Taylors' 1991 joint income tax returns showed adjusted gross income from Judy Taylor Artworks of $13,452 and no income from Hal Taylor & Associates.

19. The Taylors' tax returns reflected other income from interest, rental, farm rental, trust income and partnership income or losses from BCW Development Co. Some of the income items related to an inheritance received by J. Taylor.

20. Taylor held funds in checking accounts with Valley Bank, account numbers 1259-5259 and 73-12-579-2,

in the name of "H.W. Taylor," and account number 1341-3146, in the name of "Hal Taylor Associates."

21. J. Taylor held funds in a business account in the name of "Judy Taylor Artworks."

22. J. Taylor received an inheritance and with the funds therefrom established a savings account at Valley Bank and Trust, (Family Savings Account). Both J. Taylor and Taylor deposited substantial funds into the account and both were able to draw from the account. The Taylors considered the funds in the Family Savings Account to be joint funds. Taylor did not maintain a separate savings account.

23. In May of 1990, Taylor received $13,484.31 from the sale of real property that Taylor owned in Lemhi County, Idaho. The funds were deposited into the H. W. Taylor account and into the Family Savings Account.

24. In June of 1991, Taylor received $25,148.36 from the sale of two lots that Taylor owned in Lemhi County, Idaho. The funds were deposited into Taylor's checking account and into the Family Savings Account.

25. It was not unusual that the funds from the sale of the Idaho real property were deposited partially in the Family Savings Account, and partially in the H. W. Taylor account, because the Taylors considered their funds as partnership funds.

26. Taylor testified that he used the real property sale proceeds for living expenses. There is insufficient evidence to prove Taylor's statement that he used the sale proceeds for living expenses was incorrect.

27. The Taylors received rent of $1,750 per month from October, 1991 to April, 1992 from their home.

28. Taylor received $8,000 as back payments from social security income in 1992, and thereafter received monthly social security payments.

29. Funds received by Taylor and J. Taylor were deposited into the various accounts without consideration as to the source of the funds. Funds were withdrawn from the various accounts to pay family expenses dependent only upon what funds may have been available to pay expenses at the time.

30. It was the Taylors' practice that they did not consider that one or the other held segregated funds in which the other did not have an interest. They generally considered their marriage as a partnership and that any funds were jointly available to pay family expenses.

PARK CITY HOME

31. In November of 1973, the Taylors purchased a home in Park City, Utah (Park City Home) in joint tenancy for approximately $70,000, with a down payment of approximately $14,000. The balance of the purchase price was funded through a mortgage at First Security Bank of approximately $56,000.

32. From 1973 until 1985, Taylor's income was the primary source of funding for payment of the mortgage on the Park City Home.

33. In 1982 Taylor suffered a heart attack.

34. By warranty deed dated May 7, 1985, Taylor conveyed his interest in the Park City Home to J. Taylor and recorded the warranty deed on May 8, 1985. Taylor testified the conveyance was made for estate planning purposes and because Taylor's family had a history of heart disease.

35. Approximately seven months after the execution of the warranty deed, a check drawn on the Family Savings Account paid off the balance on the mortgage of approximately $25,000 that encumbered the Park City Home. The funds to pay off the mortgage may have come from an inheritance received by J. Taylor. In 1985, a one half interest in the Park City Home was worth more than $25,000.

36. At the time Taylor transferred the Park City Home he was a defendant in a lawsuit filed in Third District Court, Salt Lake City, with a Civil Action Number of C83-8632. The case number is at least some evidence that Taylor had been sued or threatened with suit as early as 1983. The suit resulted in judgment against Taylor after a July 21, 1986, trial. Taylor subsequently satisfied the judgment..

37. Although Taylor was involved in litigation during July of 1986, insufficient evidence exists to determine that Taylor was not generally paying his debts as they became due in May of 1985 when the Park City Home was conveyed to J. Taylor. There is insufficient evidence to find that at the time of the transfer, the sum of Taylor's debts was greater than all of Taylor's assets at a fair valuation.

38. The Taylors treated the Park City Home as their joint property and their family home throughout their marriage, and they took no action in conflict with this position

from the time of the 1985 conveyance until Taylor filed bankruptcy in 1992.

39. Taylor continued to live in the Park City Home after May of 1985, and continued to treat the Park City Home as if he had a beneficial interest therein. Taylor paid real property taxes for the years of 1988, 1989 and 1991 from his checking account, and paid some of the utilities. J. Taylor paid real property taxes from her business checking account in 1990.

40. The $60,000 Line of Credit the Taylors obtained in March of 1989 was secured by the Park City Home. The Taylors were both liable on, used, and made payments on the Line of Credit.

41. On April 3, 1989, $29,803.15 from the Line of Credit was deposited in the H. W. Taylor account.

42. Taylor used a portion of the funds that he had deposited in the H. W. Taylor account from the sale of the Idaho properties to make payments on the Line of Credit.

43. There is insufficient evidence to determine the balance owing on the Line of Credit as of July 15, 1992, or the amount of payments, if any, made on the Line of Credit by either Taylor or J. Taylor since the date of filing.

44. The estimated value of the Park City Home as of 1992 was between $250,000 and $300,000.

KNIGHT JUDGMENT AND BANKRUPTCY

45. Lynn Knight (Knight) is Taylor's only creditor listed in this bankruptcy proceeding.

46. On June 17 and 18, 1991, Taylor participated in a trial in Las Animas County, Colorado, regarding certain real estate transactions. Knight was the plaintiff and Taylor and others were defendants in this action docketed on June 29, 1990. Knight obtained a judgment dated August 12, 1991, against Taylor in the amount of $36,879 plus interest and costs of suit (Judgment). The Judgment was filed in the Third District Court of Summit County, Utah, on October 25, 1991.

47. A writ of execution was served on December 23, 1991, on a renter occupying the Park City Home. Taylor was aware of the writ of execution.

48. An order in supplemental proceedings to collect upon the Judgment was issued on June 8, 1992, and again on June 22, 1992, setting hearing dates of June 22, 1992, and June 29, 1992, respectively. The orders in supplemental proceedings directed Taylor not to sell, loan, give away, or otherwise dispose of non-exempt property pending the hearing.

49. An additional writ of execution and precipe was served upon Taylor on June 30, 1992.

50. Taylor's deposition was taken in the Supplemental Proceedings on July 2, 1992.

51. Taylor filed the within chapter 7 case on July 15, 1992.

52. Taylor's Schedule B - Personal Property, lists as assets only miscellaneous books valued at $50, miscellaneous clothing valued at $100 and a 1987 Oldsmobile valued at $1,000. He listed Knight as his only creditor. He did not disclose any transfers.

1990 JEEP WAGONEER

53. By documents dated August 12, 1991, Taylor and J. Taylor purchased a 1990 Jeep Wagoneer that became subject to the writ of execution. The vehicle was purchased jointly in the names of Harold W. Taylor and Julia W. Taylor and was unencumbered.

54. On or about June 28, 1992, and by documents dated July 15, 1992, (the same date as the bankruptcy filing) the Taylors traded in the 1990 Jeep Wagoneer which had broken down on numerous occasions, and purchased a 1993 Jeep Grand Cherokee solely in the name of Julia W. Taylor. The Taylors received a trade-in credit of $11,487 for the 1990 Jeep Wagoneer, one half of which belonged to Taylor. Taylor received no consideration from J. Taylor for placing title to the 1993 Jeep Grand Cherokee solely in her name.

55. The evidence is insufficient to determine the exact date upon which legal title to the 1990 Jeep Wagoneer was transferred. As of the date of filing the within petition, however, Taylor had either just transferred his one-half interest in the 1990 Jeep Wagoneer, or he still possessed a one-half interest in the 1990 Jeep Wagoneer and the transfer occurred immediately post-petition.

56. Although Taylor testified he was not able to pay the Judgment and the Line of Credit, there is insufficient evidence to show Taylor was not generally paying his other debts as they became due at the time the 1990 Jeep Wagoneer was traded in for the 1993 Jeep Grand Cherokee. There is insufficient evidence that at the time of the trade-in, the sum of Taylor's debts was greater than all of Taylor's assets, including his equitable interests, at a fair -valuation.

57. Although J. Taylor may have incurred an obligation to Chrysler Credit Corporation to finance the balance of the purchase price of the 1993 Jeep Grand Cherokee, Taylor made two post-petition payments of $223.79 drawn on the H.W. Taylor account in partial payment of the Chrysler Credit Corporation obligation.

58. Both Taylor and J. Taylor used the 1993 Jeep Grand Cherokee.

59. The 1993 Jeep Grand Cherokee was subsequently stolen and the Taylors received the proceeds of insurance on the vehicle. The evidence traced the insurance proceeds to the Taylors' purchase of a 1989 Voyager with approximately 100,000 miles. There is no evidence as to the value of the 1989 Voyager. The Voyager is now the Taylors only vehicle. J. Taylor is the primary user of the 1989 Voyager, but Taylor uses it once every two or three days.

60. Taylor's transfer of his one-half interest in the 1990 Jeep Wagoneer was not disclosed in his Statement of Financial Affairs. Alternatively, Taylor's one-half interest in the 1990 Jeep Wagoneer was not listed as an asset in Taylor's

Schedules, nor was his $5,743.50 interest in the 1993 Jeep Grand Cherokee.

61. When Taylor transferred his one-half interest in the 1990 Jeep Wagoneer, his intent in placing title in the 1993 Jeep Grand Cherokee solely in J. Taylor's name was to hinder, delay, or defraud his creditor, Knight.

LIFE INSURANCE POLICIES

62. Taylor is the insured under State Farm Life Insurance Policy, policy number LF-0969-1630, issued on September 2, 1988. J. Taylor owns the policy and is the primary beneficiary. The annual premium on the policy is $7,625. The total value of the policy as of December 19, 1994, was $9,542.81. The value of the policy as of July, 1992, is not in evidence.

63. The State Farm Life Insurance policy number LF-969-1630 was purchased on September of 1988, approximately two years prior to the time Taylor was sued by Knight. There is no evidence that Taylor had been sued by other creditors at the time he purchased the policy.

64. On September 18, 1988, Taylor issued a check payable to State Farm in the amount of $4,657.75 drawn on the H.W. Taylor account and referencing "969-1630". On August 23, 1990 and August 19, 1991, Taylor issued checks payable to State Farm in the amount of $7,625 each. Both checks were drawn on the H.W. Taylor account. On August 24, 1992, Taylor issued a check payable to State Farm in the amount of $7,625, drawn on the Hal Taylor Associates account and referencing "969-1630".

65. J. Taylor is the owner and the insured on a second State Farm Life Insurance Policy, policy number LF-1149-8040. There is no evidence of who is the named beneficiary on the policy. The policy is a $400,000 Universal Life Policy purchased April 5, 1991. The total value of the policy as of February 23, 1995, was $1,259.50. The value of the policy as of July, 1992, is not in evidence.

66. State Farm Life Insurance policy number LF-1149-8040 was purchased April 5, 1991, after Taylor had been sued by Knight and two months prior to the Las Animas County, Colorado trial.

67. On June 19, 1991 (the day after the Knight trial), Taylor Issued a check related to State Farm Life Insurance policy number LF-1149-8040, and payable to State Farm in the amount of $10,470 that was drawn on the H.W. Taylor account.

68. There is insufficient evidence that the $10,470 payment was made as a result of the Knight litigation.

69. Taylor owns two additional State Farm policies. Cody Taylor is the insured on State Farm Life Insurance Policy, policy number LF-0642-0748. J. Taylor is the insured on State Farm Life Insurance Policy, policy number LF-0983-0697. J. Taylor is the owner of an additional State Farm Life Insurance Policy, policy number LF-0811-3638 and Cody Taylor is the insured under the policy.

70. Taylor's conflicting testimony was that the policies were purchased because they would accrue cash value, but also for estate protection and not for their cash

values. Taylor withdrew at least some of the cash value on the State Farm policies and used the money to pay family expenses, but there is insufficient evidence to determine the amounts, dates and policies that were drawn upon.

71. J. Taylor testified that the life insurance premiums were paid with joint funds. Although Taylor made most of the payments, the payments were made for the benefit of their family. J. Taylor did not consider drawing on the cash value of the policies until recently.

72. The Taylors held multiple cash value life insurance policies with New York Life Insurance Company. The various policies were not introduced into evidence and the cash value of the policies as of the date of filing is not in evidence.

73. On May 12, 1988, Taylor issued a check payable to New York Life Insurance Company in the amount of $1,390.68 drawn on the H.W. Taylor account. Taylor could not recall the reason for the payment. On November 18, 1988, Taylor issued a check payable to New York Life Insurance Company in the amount of $547.83 drawn on the H.W. Taylor account. Taylor testified that the $547.83 check was a premium payment on one of his life insurance policies. On December 18, 1990, Taylor issued a third check payable to New York Life Insurance Company in the amount of $240.50 drawn on the H.W. Taylor account to pay the premium on a small policy insuring Cody Taylor.

74. New York Life issued a check dated October 12, 1990, to J. Taylor in the amount of $4,018.57 and referencing policy number 31 767 544. J. Taylor could

not recall the transaction. Taylor testified that the funds were a loan against the policy and were used for family expenses.

75. Taylor used funds derived in part from his own income to pay premiums on the policies with State Farm Life Insurance Company and the policies with New York Life Insurance Company. Insufficient evidence exists to determine that at the time he paid the premiums, Taylor was not generally paying his debts as they became due, or that the sum of his debts was greater than all of his assets at a fair valuation.

76. At the time Taylor made some of the payments on the State Farm Life Insurance policies, he was a defendant in the lawsuit filed by Knight.

77. The evidence is insufficient to determine that Taylor exercised control over the State Farm Life Insurance policies not owned by him, or the New York Life Insurance Policies. If any inference can be drawn from the evidence, it would be that J. Taylor controlled the New York Life Insurance policy related to the $4,018.57 check issued to her.

COVEY & COMPANY STOCK

78. Taylor used funds derived in part from his own income to purchase stocks in the name of J. Taylor at Covey & Company, a stock brokerage, over a period of years.

79. J. Taylor testified that the stocks were purchased in her name with joint funds for estate planning purposes.

80. J. Taylor did not conduct any transactions through the Covey & Company account in her name. Taylor was the only person who conducted trades in the account.

81. On July 12, 1990, Taylor paid for stock purchased in the name of J. Taylor by issuing a $2,000 check drawn on his personal account made payable to Covey & Company. There is no evidence that the value of the $2,000 remained in the Covey & Company account as of the date of filing, or that J. Taylor has the benefit of the $2,000.

82. Taylor deposited a social security check for $523 into the Hal Taylor Associates account on July 9, 1992. Taylor purchased stock valued at $345 from Covey & Company by check dated July 20, 1992, drawn on the Hal Taylor Associates account. The stock purchase took place five days after Taylor filed his bankruptcy petition on July 15, 1992, but ten days before he filed his Schedules and Statement of Financial Affairs on July 30, 1992. Taylor did not list the stock purchase in his Schedules and Statements of Affairs.

83. There is no evidence of the balance in the Covey & Company account on the date Taylor filed his bankruptcy petition. On or about the third quarter of 1994, stock of a market value of only $.09 remained in the account. There is insufficient evidence that would link any specific stock purchase to the stock currently held in the Covey & Company account.

84. There is insufficient evidence to show that, at the time Taylor purchased stock in 1990, Taylor had been sued or had been threatened with suit. At the time Taylor purchased stock on July 20, 1992, he had been served with a

writ of execution by Knight and was subject to an Order in Supplemental Proceeding that was stayed as a result of this chapter 7 filing.

85. Insufficient evidence exists to demonstrate that at time he purchased the stocks in J. Taylor's name, Taylor was not generally paying his debts as they became due or that the sum of his debts was greater than all of his assets, including his equitable interests, at a fair valuation.

CONCLUSIONS OF LAW

The jurisdiction of this court is properly invoked pursuant to 28 U.S.C. §§ 157(a) and 1334(b); Fed. R.Bankr. P. 7001(l) and (2), and D. Ut. #404(a) of the United States District Court for the District of Utah. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) (H) (K) and (0). Venue is proper in the Central Division of the District of Utah pursuant to 28 U.S.C. § 1409(a).

ACTUAL FRAUD PURSUANT TO UTAH CODE ANN. § 25-6-5(l) AND 11 U.S.C. § 548(a)(l)

Rupp asserts that Taylor has transferred his assets with actual intent to hinder, delay, or defraud his creditors pursuant to the Uniform Fraudulent Transfer Act, Utah Code Ann. § 25-6-1, *et seq.* (1988)[2] and 11 U.S.C. § 548(a)(1).[3]

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[2] The Utah Fraudulent Conveyance Act, Utah Code Ann. §§ 25-1-1 to 25-1-16 (1984), was repealed effective April 25, 1988. It has been replaced by the Uniform Fraudulent Transfer Act contained at Utah Code Ann. §§ 25-6-1, *et. seq. (1988).*

[3] Section 548(a)(1) states:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation

The elements of a fraudulent transfer under state law are set forth in Utah Code Ann. § 25-6-5 for transfers occurring on or after April 25, 1988, and in Utah Code Ann. § 25-1-7 for transfer occurring before April 25, 1988. The 1985 transfer of the Park City Home is the only transfer governed by the prior statute, Utah Code Ann. § 25-1-7 (1984). For all subsequent transfers the Uniform Fraudulent Transfer Act provisions contained in Utah Code Ann. § 25-6-4 (1988) are applicable.

Rupp bears the burden of proving actual fraud pursuant to the state statute by clear and convincing evidence. *Territorial Savings & Loan Ass'n v. Baird,* 781 P.2d 452, 462 (Utah Ct. App. 1989). A split of authority exists, however, in courts construing the burden of proof to be applied pursuant to § 548(a)(1). Several bankruptcy courts have held that the standard is clear and convincing evidence.[4] Other

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3 Cont. incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily

> (1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted;

4 *Glinka v. Bank of Vermont (In re Kelton Motors, Inc.),* 130 B.R. 170, 179 (Bankr. D. Vt. 1991); *Sommers v. Sorce (In re Major Funding Corp.),* 126 B.R. 504, 508 (Bankr. S.D. Tex. 1990); *Official Unsecured Creditors Committee v. Kuhns (In re Kuhns), 101* B.R. 233, 241 (Bankr. D. Mont. 1989); *Armstrong v. Ketterling (In re Anchorage Marina, Inc.),* 93 B.R. 686, 691 (Bankr. D.N.D. 1988); *Talbot v. Warner (In re Warner),* 65 B.R. 512, 518-519 (Bankr. S.D. Ohio 1986).

courts have held that the standard is a preponderance, extending the holding in *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654 (1991), to fill bankruptcy proceedings grounded in allegations of fraud. "[5] This court finds it unnecessary to resolve the split of authority because Rupp has either met his burden by clear and convincing evidence, or in those instances where he has not meet his burden, he has failed to do so even by the lesser preponderance standard.

The Uniform Fraudulent Transfer Act, Utah Code Ann. § 25-6-5(2)(1988), contains a list of non-exclusive factors or "badges of fraud" that may be considered as circumstantial evidence of the debtor's actual intent to defraud.[6] Similar

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[5] *Thompson v. Jonovich (In re Food & Fibre Protection, Ltd.)*, 168 B.R. 408, 418 (Bankr. D. Ariz. 1994) (quoting *Western Wire Works, Inc., v. Lawler (In re Lawler)*, 141 B.R. 425 (9th Cir. BAP 1992)); *Mancuso v. T. Ishida USA, Inc., (In re Sullivan)*, 161 B.R. 776, 779-780 (Bankr. N.D. Tex. 1993).

[6] The factors are:

(a) the transfer or obligation was to an insider;
(b) the debtor retained possession or control of the property transferred after the transfer;
(c) the transfer or obligation was disclosed or concealed;
(d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit,
(e) the transfer was of substantially all the debtor's assets;
(f) the debtor absconded;
(g) the debtor removed or concealed assets;

badges of fraud were established by case law prior to the state of Utah's adoption of the Uniform Fraudulent Transfer Act in 1988. *See Dahnken, Inc. v. Wilmarth,* 726 P.2d 420, 423 (Utah 1986) (citing *Givan v. Lambeth, 10* Utah 2d 287, 291, 351 P.2d 959, 962 (1960)). Fraudulent intent can be inferred where one or more of the badges are present. *Territorial Savings & Loan Ass'n v. Baird,* 781 P.2d at 462; *see Dahnken,* 726 P. 2d at 423.

Bankruptcy courts have considered similar badges of fraud or "circumstantial indicia of fraudulent intent" as evidence of actual intent to defraud under § 548(a)(1). Max *Sugarman Funeral Home, Inc. v. A.D.B. Investors,* 926 F.2d 1248, 1254 (1st Cir. 1991); *Thompson v. Jonovich (In re Food & Fibre Protection, Ltd.),* 168 B.R. 408 (Bankr. D. Ariz. 1994). The presence of several badges of fraud can amount to "conclusive evidence of an actual intent to defraud." *Max Sugarman,* 926 F. 2d at 1254-55.

Park City Home

Taylor transferred the Park City Home to J. Taylor, a family member, and an insider of Taylor as defined

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6 Cont.

(h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Utah Code Ann. § 25-6-5(2) (1988).

by § 101(31)(A)(I). He continued to live in and use the Park City Home, retaining both possession and control over the property. These factors weigh in favor of Rupp.

Taylor, however, recorded the warranty deed and did not conceal the transfer of the Park City Home. The evidence is insufficient to determine whether any other badges of fraud apply. There is no evidence that Taylor was insolvent at the time he transferred the Park City Home. There is no evidence that the transfer was made in anticipation of litigation. Although Taylor may have been a defendant in a lawsuit as early as 1983, Taylor paid in full. the judgment which resulted from that litigation approximately one year after the transfer of the Park City Home. Taylor received some consideration for the transfer because J. Taylor paid off the $25,000 mortgage remaining on the Park City Home, an obligation for which Taylor would have been jointly liable. The evidence is inconclusive regarding the value of the Park City Home at the time of transfer for the purpose of determining whether reasonably equivalent value or fair consideration was given. At a minimum, a one half interest in the Park City Home was worth more than $25,000.

The transfer of the Park City Home was made without actual intent to hinder, delay or defraud creditors as set forth in Utah Code Ann. § 25-1-7 (1984) as made applicable by § 544 of the Bankruptcy Code. The transfer of the Park City Home was not a transfer made within one year of the date of filing of the petition as required by § 548(a)(1). Rupp has not sustained his burden of proving by either clear and convincing evidence or a preponderance of the evidence that Taylor transferred the Park City Home with actual intent

to hinder, delay, or defraud a creditor of the debtor under either Utah Code Ann. § 25-1-7 or § 548.[7]

1990 Jeep Wagoneer

Taylor transferred his one half interest in the 1990 Jeep Wagoneer to J. Taylor, an insider, within one year before the date of filing of his bankruptcy petition, or immediately thereafter. The transfer of Taylor's one-half interest occurred after the Judgment was incurred. Taylor transferred the 1990 Jeep Wagoneer at the time he was subject to a writ of execution and an order in supplemental proceedings pertaining to the Judgment. Taylor concealed the transfer by failing to disclose it in his Statement of Financial Affairs, and by not listing his interest in either the 1990 Jeep Wagoneer or the 1993 Jeep Grand Cherokee as an asset in his Schedules. Taylor continued to use the 1993 Jeep Grand Cherokee and made at least two payments thereon.

Rupp has sustained his burden of proving by clear and convincing evidence that Taylor transferred his interest in the 1990 Jeep Wagoneer with actual intent to hinder, delay, or defraud a creditor of the debtor pursuant to Utah Code Ann. § 25-6-5(l) as made applicable by § 544, and § 548(a)(1) and the transfer is avoided. Rupp is entitled to judgment on behalf of the estate against J. Taylor, as the initial transferee of Taylor's $5,743.50 interest in the 1990 Jeep Wagoneer, pur-

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[7] The court need not make a determination of which statutory analysis is most appropriate in this case because the relief requested is denied under either statute.

suant to § 550(a)(1). Since Rupp has prevailed in recovering Taylor's $5,743.50 interest in the 1990 Jeep Wagoneer, it is unnecessary to analyze the transfer of the 1990 Jeep Wagoneer under the alternative theories Rupp plead.

Life Insurance Policies

To the extent Taylor paid the premiums on insurance policies owned by J. Taylor on various occasions between 1988 and 1992, it is arguable that Taylor transferred assets not to an insider, but to the insurance companies to pay for current insurance benefits. *Rupp v. Markgraf,* No. 94-C-288J, slip op. at 8-9 (D. Utah July 6, 1995)(interpreting § 25-6-6(l) of the Utah Fraudulent Transfer Act-such that bank from whom a cashiers check was purchased was initial transferees of the debtor's property, not the recipients of the cashiers check), *appeal docketed,* No. 95-4120 (10th Cir. July 26, 1995). Although some of the premiums were paid by Taylor at the time he was defending litigation filed by Knight and at or near the time Knight obtained a judgment against Taylor, the payments appear to represent regular annual premiums. There is either no evidence or insufficient evidence to demonstrate the existence of any of the other badges of fraud.

Rupp has not sustained his burden of proving by either clear and convincing evidence or a preponderance of the evidence that Taylor's payment of insurance premiums were transfers made with actual intent to hinder, delay, or defraud a creditor of the debtor under § 548(a)(1) or Utah Code Ann. §25-6-5(l) as made applicable by § 544.

Covey & Company Stock

The evidence shows Taylor purchased stock from Covey & Company in J. Taylor's name in the amount of $2,000 on July 12, 1990, and $345 on July 20, 1992. Although there is evidence that Taylor retained control of the Covey & Company account, there is insufficient evidence to show that Taylor was insolvent or that he satisfied enough of the badges of fraud to provide circumstantial evidence of an intent to defraud his creditors at the time he purchased the stock in 1990. Finally, the purchase of stock in 1990 is beyond the one year statutory reach-back period contemplated by § 548(a)(1).

Taylor's purchase of $345 in stock from Covey & Company on July 20, 1992, took place five days after Taylor filed his bankruptcy petition. Rupp has not presented sufficient evidence to demonstrate that the $345 used to purchase the stock post-petition was estate property. The only evidence before the court is that Taylor deposited a social security check for $523 into the account of Hal Taylor Associates on July 9, 1992. However, the evidence does not tie the deposited funds to the funds used post-petition to purchase the stock. Although the court recognizes some nexus between the two, such circumstantial evidence is insufficient to link the funds. Section 548(a)(1) is also inapplicable to these facts to the extent its application is expressly limited to transfers occurring on or within one year before the date of filing. Taylor's postpetition purchase of stock may give rise to a claim pursuant to § 549, but this theory was neither plead nor proved by Rupp in this proceeding.

Rupp has not sustained his burden of proving by either clear and convincing evidence or a preponderance of the evidence that Taylor's purchases of stock in the name of J. Taylor on July 12, 1990, in the amount of $2,000, or on July 20, 1992, in the amount of $345, were transfers made with actual intent to hinder, delay, or defraud a creditor pursuant to Utah Code Ann. § 25-6-5(l) as made applicable by § 544, or to § 548(a)(1).

CONSTRUCTIVE FRAUD PURSUANT TO UTAH CODE ANN. § 25- 6-6(l) AND § 548(a)(2)

The Uniform Fraudulent Transfer Act contained at Utah Code Ann. § 25-6-6 (1988)[8] provides three requirements for proving constructive fraud. Under Utah law the plaintiff must demonstrate all three of the following elements by clear and convincing evidence: 1) the plaintiff is a creditor of the debtor; 2) the debtor was insolvent or rendered insolvent by the conveyance; and 3) the conveyance was made without fair consideration. *Territorial Savings & Loan Ass'n v. Baird,* 781 P.2d 452, 458 (Utah Ct. App. 1989).

Section 548(a)(2) of the Bankruptcy Code contains constructive fraud elements similar to the state statute, requiring that a debtor be insolvent, or rendered insolvent at

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[8] Taylor's transfer of the Park City Home in 1985, occurred before the enactment of this statute in April 25, 1988, and is governed by Utah Code Ann. § 25-1-4 (1985). The requirements of the two statutes are substantially similar.

the time of the transfer and have received less than reasonably equivalent value. Section 548 also contains a one year reach back provision. The trustee bears the burden of demonstrating constructive fraud pursuant to § 548(a)(2) merely by a preponderance of the evidence. *Glinka v. Bank of Vermont (In re Kelton Motors, Inc.),* 130 B. R. 170, 179 (Bankr. D. Vt. 1991).

Insolvency is defined by both the Bankruptcy Code and in the state statute. Section 101(32), Utah Code Ann. § 25-6-3 (1988) and Utah Code Ann. § 25-1-2 (1984) contain definitions of insolvency based on a balance sheet test. Utah Code Ann. § 25-6-3 (1988) adds a presumption that one who does not pay his or her debts as they become due is insolvent.

Insufficient evidence exists to determine that Taylor was insolvent as defined by either the state statute or the Bankruptcy Code when the relevant transfers were made. Although Taylor testified he was not able to pay the Judgment and the Line of Credit, Rupp has failed to demonstrate by a preponderance of the evidence that Taylor was not generally paying his other debts as they became due. Rupp has also failed to prove by a preponderance of the evidence that the sum of Taylor's debts was greater than the sum of his assets, including his equitable interests, at fair valuation. Because insolvency is a key element that must be proved to establish constructive fraud, Rupp has failed to prove his cause of action pursuant to Utah Code Ann. § 25-1-4 (1984), Utah Code Ann. § 25-6-6(l) (1988) or 11 U.S.C. § 548(a)(2).

EQUITABLE INTERESTS AND IMPOSITION OF CONSTRUCTIVE TRUST

Pursuant to § 704, Rupp is charged with the duty to collect and reduce to money property of the estate. In this case Rupp must stand, not in the shoes of creditors under § 544, but in the shoes of Taylor, who allegedly holds an equitable interest in the Park City Home, the life insurance policies and the Covey & Company stock. Section 541 includes not only legal interests but equitable interests held by the debtor as of the commencement of the case.[9]

Although § 541 controls the determination of what constitutes property of the estate, "bankruptcy courts must still look to state law to determine the existence and nature of the debtor's interest in property. *Kandel v. Reichel (In re Strabley),* 96 B.R. 785 Bankr. N.D. Ohio 1988); *See In re Linderman,* 20 B. R. 826, 828-29 (Bankr. W. D. Wash. 1982) (Bankruptcy Code relies upon non-bankruptcy law to determine whether a legal or equitable interest in property exists for the purposes of 11 U.S.C. § 541(a)(1)).

The burden of establishing an equitable interest in property by overcoming a written instrument is by clear and

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[9] Section 541 states:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Stich estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case. . ..

convincing evidence. *Baker v. Pattee,* 684 P. 2d 632, 634. (Utah 1984). Thus, a party seeking to establish a constructive trust must "show by clear and convincing evidence that equitable grounds for imposing a trust exist." *Hiltsley v. Ryder,* 738 P. 2d 1024, 1026-27 (Utah 1987) (Zimmerman, J. concurring) (citing *Baker v. Pattee,* 684 P.2d 632, 637 (Utah 1984)).

Statute of Limitations

Utah Code Ann. § 78-12-25(3) provides a four year statute of limitations on actions for relief not otherwise provided for by law. " Utah courts have applied this catch-all provision to actions in equity. *See American Tierra Corp. v. City of West Jordan,* 340 P. 2d 757, 761 (Utah 1992). The statute of limitations for actions in equity begins to run when an action is taken to repudiate a contract or an adverse position is asserted. *Carnesecca v. Carnesecca, 572* P.2d 708, 711 (Utah 1977) (citing *In re Madsen's Estate,* 123 Utah 327, 259 P.2d 595 (1953).[10]

In this case Rupp first asserted an adverse position when the Complaint was filed on March 10, 1994, claiming an equitable interest in J. Taylor's sole legal title to the Park City Home and other personal property on behalf of the estate. However, since Rupp stands in Taylor's shoes, the court must also consider at what point Taylor began to assert

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[10] *Cf. American Tierra Corp. v. City of West Jordan,* 840 P.2d 757, 761 (Utah 1992) (limitation period begins to run as of the date on which the action could have been maintained to a successful conclusion).

an adverse position. Taylor lived in the Park City Home and continued to use it and the Covey & Company account as his own through the time he filed his bankruptcy petition. On July 30, 1992, Taylor filed his bankruptcy Statements and Schedules and did not list his equitable interest in the Park City Home or the other personal property at issue. It was at this point that Taylor began to assert a position adverse to his alleged ownership of an equitable interest in the Park City Home, the life insurance policies and the Covey & Company stock. July 30, 1992, is the earliest date from which the four year statute of limitations began to run. Rupp's Complaint was filed on March 10, 1994, and is within the four year statute of limitations.

Remedies

Under Utah law the court may impose a constructive trust to avoid unjust enrichment by a party holding legal title to property subject to the equitable interest of another. *Parks v. Zions First National Bank,* 673 P.2d 590, 600 (Utah 1983). Numerous types of constructive trusts exist and their forms and varieties are nearly limitless. *Parks,* 673 P.2d at 597. A constructive trust is an equitable remedy which "arises by operation of law and is not within the statute of frauds." *Nielson v. Rasmussen,* 558 P.2d 511, 513 (Utah 1976) (quoting *Haws v. Jensen,* 116 Utah 212, 209 P.2d 229 (1949)).

Resulting Trust

Rupp asserts that he may recover under a resulting trust theory. The general rule states that a purchase money resulting trust arises where one party pays the purchase price for property titled in the name of another. *Bill Nay & Sons*

Excavating v. Neeley Construction Co., 677 P.2d 1120, 1122 (Utah 1984); *Zion's First National Bank v. Fennemore (In re Hock), 655* P.2d 11 11, *11* 15 (Utah 1982). Where these elements are established, it is unnecessary to prove that a trust was intended, because an inference is raised that the recipient was not to take the beneficial interest in the property. *Fennemore,* 655 P.2d at 1115.

An exception to this general rule arises pursuant to § 442 of the Restatement (Second) of Trusts when a husband pays the purchase price, but places title to property in his wife's name.[11] In that case, the law will infer donative intent unless the transferor can rebut the presumption of a gift. *Parks v. Zions First National Bank,* 673 P.2d 590, 607 (Utah 1983) Howe, dissenting). Where the transferor is unable to rebut the presumption, "he has no equitable or beneficial interest because he reserved none. "*Parks,* 673 P.2d 590, 608 (J. Howe, dissenting). Where the transferor is unable to rebut the presumption, "he has no equitable or beneficial interest because he reserved none." *Parks*, 673 P. 2d 590, 608 (J. Howe, dissenting).

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[11] Section 442 of the Restatement states:

> Where a transfer of property is made to one person and the purchase price is paid by another and the transferee is a wife, child or other natural object of bounty of the person by whom the purchase price is paid, a resulting trust does not arise unless the latter manifests an intention that the transferee should not have the beneficial interest in the property.

Parks v. Zions First National Bank, 673 P.2d 590, 598 (Utah 1983) (quoting § 442 Restatement (Second) of Trusts).

In order to establish a resulting trust, Rupp, standing in Taylor's shoes, must rebut the presumption that Taylor transferred the Park City Home, the insurance premiums and the Covey & Company stock to J. Taylor as a gift. To rebut the inference of a gift Rupp must demonstrate by clear and convincing evidence that Taylor intended that J. Taylor "should not have the beneficial interest in each piece of property as it was acquired. "*Parks,* 673 P.2d 590, 607 (J. Howe, dissenting). Although Rupp must show that Taylor intended to retain the equitable or beneficial interest in the property transferred at the time of the transfer, the Taylors subsequent conduct may provide evidence of Taylor's intent at the time of the transfer. *Parks,* 673 P. 2d 590, 607 (J. Howe, dissenting). The nature of the interest retained by Taylor in the transferred property, if any, is also an element of a constructive trust based on unjust enrichment as described below. For this reason, Rupp's resulting trust and constructive trust arguments will. be addressed together below.

Constructive Trust Based on Unjust Enrichment

While a resulting trust pursuant to § 442 of the Restatement (Second) of Trusts requires a showing of intent by the transferor to retain a beneficial interest, the broadest forms of constructive trusts, such as those created by § 160 of the Restatement of Restitution (1937), require no element of intent. *Parks,* 673 P.2d at 599; *Hiltsley v. Ryder,* 738 P.2d 1024, 1026 (Utah 1987) (J. Zimmerman concurring) (a constructive trust may be imposed in the absence of any express or implied intention to form a trust to prevent unjust enrichment). Section 160 of the Restatement of Restitution provides that a constructive trust may arise "where a person holding title to property is subject to an equitable duty to

convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it". *Parks,* 673 P.2d at 599 (quoting Restatement of Restitution § 160 (1937)). In *Parks,* the court imposed a constructive trust to avoid unjust enrichment after finding that the plaintiff had an equitable interest in the property because his "labors and earnings were responsible for the acquisition of a substantial portion of the marital estate. " *Parks,* 673 P. 2d at 600. Based on *Parks,* this court may impose a constructive trust pursuant to § 160 of the Restatement to avoid unjust enrichment by J. Taylor if Taylor retained an equitable interest in the transferred property.

Park City Home

Taylor had an equitable interest in the Park City Home at the time he transferred legal title to J. Taylor and he continued to have an equitable interest in the property up to and through the time his bankruptcy petition was filed. Taylor's equitable interest is evidenced by his original purchase of the Park City Home in 1973 and his continuing payments on the underlying mortgage debt. The Park City Home was purchased and the transfer was made at times when Taylor had substantial income. When the Taylors later obtained the $60,000 Line of Credit in March of 1989, both Taylor and J. Taylor were liable on the loan. Subsequently Taylor made payments on the Line of Credit and paid taxes, insurance and utilities on the Park City Home.

The Taylors testified that they transferred legal title because of estate planning and inheritance tax concerns after Taylor's heart attack. However, the fact that Taylor never intended to convey the full beneficial interest in the Park City Home to J. Taylor as a gift is evidenced by the Taylors'

conduct after Taylor transferred legal title to J. Taylor in 1985. The Taylors treated the Park City Home as their joint marital property and their family home throughout their marriage, both before and. after Taylor transferred legal title to the property to J. Taylor.

Their conduct at the time of transfer and subsequent to, the transfer shows that they intended Taylor to retain an interest in the property. Rupp has overcome the presumption that Taylor's transfer of legal title to his one half undivided joint tenant interest in the Park City Home to J. Taylor was intended as a gift. Rupp has met his burden of demonstrating by clear and convincing evidence that Taylor retained an equitable undivided one-half interest in the Park City Home, and Rupp is entitled to judgment quieting title to the undivided one-half interest in the estate. The court will impose both a resulting trust in Taylor's undivided one-half interest in the Park City Home, and a constructive trust in Taylor's undivided one-half interest in the Park City Home because J. Taylor would be unjustly enriched by retaining exclusive ownership of the Park City Home despite Taylor's equitable interest.[12] The trusts shall be in favor of Rupp, as trustee of this estate, for the benefit of Taylor's creditors.

---

[12] *Parks*, 673 P.2d at 600 (citation omitted) (resulting and constructive trust may be imposed upon accumulated assets in whatever form they now take); *see Butler v. Wilkerson*, 740 P.2d 1244, 1262 (Utah 1987) (where original property was sold to a *bona fide* purchaser and could no longer be recovered, court imposed constructive trust over proceeds to avoid unjust enrichment from retention of market appreciation).

Life Insurance Policies

Taylor made payments on two State Farm Life Insurance policies owned by J. Taylor, policy numbers LF-969-1630 and LF-1149-8040. Both policies had accrued cash values, as did three other State Farm Life Insurance policies owned by either Taylor or J. Taylor. Taylor paid premiums on both policies with checks from his personal account and with at least one check from the Hal Taylor Associates account. Taylor testified that the Taylors withdrew some of the cash value on the State Farm Life Insurance policies for family expenses, but Taylor did not specify whether the cash values that were withdrawn were from policies LF-969-1630 and LF1149-8040 or from other policies. Taylor also did not specify the amounts withdrawn or the timing of the withdrawals.

Rupp has not demonstrated by clear and convincing evidence that Taylor intended to retain a beneficial interest in the insurance premium payments or the State Farm Life Insurance policies themselves. Rupp has failed to overcome the presumption that Taylor's payments of policy premiums to State Farm on policies owned by J. Taylor were intended as a gift to J. Taylor. Rupp has failed to meet his burden by clear and convincing evidence that Taylor exercised dominion and control over the insurance policies sufficient to retain a beneficial interest from which the court could determine that Taylor had an equitable interest in the State Farm Life Insurance policies. The court will not impose either a resulting trust or a constructive trust in favor of Rupp in relation to the State Farm Life Insurance policies.

Taylor made two payments to New York Life by checks drawn on his personal account. The New York Life

Insurance policies had cash values, but there is no evidence of the total cash values available at any time prior to Taylor's bankruptcy filing.

There is no evidence as to who is the owner of the New York Life Insurance polices. In order for the court to determine that Taylor has an equitable interest in the New York Life Insurance policies, or that Taylor intended to make a gift to J. Taylor by paying premiums on the policies, the evidence must show that J. Taylor had an ownership interest in the New York Life Insurance policies. The policies are not in evidence. The fact that New York Life issued the October 12, 1990, check in the amount of $4,018 to J. Taylor as a loan against the cash value of policy number 31 767 544 is only circumstantial evidence that J. Taylor owned the policy. Even if J. Taylor owned the policy, there is insufficient evidence to demonstrate that the two checks made payable to New York Life Insurance Company by Taylor were premium payments on the same policy from which J. Taylor received the $4,018 loan.

Rupp has failed to establish by clear and convincing evidence that Taylor transferred property in which he retained an equitable interest to J. Taylor by making the two payments on the New York Life Insurance policies. Even if Rupp has established that Taylor made two premium payments on a policy owned by J. Taylor, Rupp has failed to overcome the presumption that Taylor's payments were intended as a gift to J. Taylor. Rupp has failed to meet his burden by clear and convincing evidence that Taylor retained a beneficial interest in the payments from which the court could determine that Taylor had an equitable interest in the *New* York Life Insurance policies. The court will not impose either a resulting trust or a constructive trust in favor of Rupp in

payments made by Taylor to New York Life Insurance Company.

Covey & Company Stock

Taylor made two purchases of stock from Covey & Company in the name of J. Taylor. The first purchase in the amount of $2,000 was made by Taylor on July 12, 1990. The court must make the initial presumption that Taylor intended to make a gift to J. Taylor at the time he purchased the $2,000 in stock by placing the stock account in J. Taylor's name. J. Taylor testified that the stock was purchased for estate planning purposes. Rupp has established, however, that the stock was purchased less than two weeks after Knight filed suit against Taylor and at a time when Taylor had income from the sale of property he owned in Lemhi County, Idaho. Taylor continued to exercise control over the stock after the purchase, and J. Taylor never conducted any transactions related to the account in her name. The court concludes from this, evidence that Taylor did not intend to transfer to J. Taylor the beneficial interest in the $2,000 used to purchase the stock, and Rupp has overcome the presumption that Taylor intended to purchase the stock as a gift to J. Taylor. Rupp has meet his burden of demonstrating by clear and convincing evidence that Taylor retained an equitable interest in the $2,000 used to purchase stock solely in J. Taylor's name. Although grounds exist to impose a resulting trust in favor of Rupp on Taylor's $2,000 interest in the Covey & Company stock, there is no evidence that $2,000 in value remained in the Covey & Company account as of the date of filing, and there is no evidence from which the court can determine the value, if any, remaining in the Covey & Company account on the date Taylor filed his bankruptcy petition. The court will not impose a resulting

trust because there is no evidence that there is any property titled in J. Taylor's name to which the trust could attach.[13] The court cannot determine that J. Taylor would be unjustly enriched by retaining ownership of the Covey & Company stock despite Taylor's equitable interest because there is no evidence that the Covey & Company account had any value as of the date of filing. The court will not impose a constructive trust on the Covey & Company stock account based upon unjust enrichment.

Taylor made a second stock purchase in the amount of $345 from Covey & Company on July 20, 1992. The Court's ability to determine whether Taylor used estate assets to make the $345 stock purchase on July 20, 1992, is hindered by gaps in the evidence presented by Rupp. The $345 purchase of stock took place five days post-petition. Rupp has not established a sufficient nexus between Taylor's deposit of the social security check in the amount of $523 into the Hal Taylor Associates account pre-petition, and his post-petition purchase of the stock from the same account. Without further evidence the court cannot conclude that the $345 stock purchase was made with property of the estate subject to recovery by Rupp, even had Rupp so plead under §549.

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[13] *In Butler v. Wilkerson*, the court imposed a constructive trust based upon unjust enrichment and awarded a money judgment premised upon an increase in market value of the underlying property. In this case, since the evidence shows losses in the Covey & Company account, no money judgment will be awarded as a result of the $2,000 payment.

Rupp has failed to establish by clear and convincing evidence that Rupp, standing in Taylor's shoes, holds an equitable interest in the stock purchased by Taylor post-petition. Although Rupp may have a claim pursuant to § 549 for avoidance of a post-petition transfer of property of the estate. there is insufficient evidence to establish that this particular transfer of $345 was made with property of Taylor's bankruptcy estate.

By document dated September 8, 1995, the court hereby enters Judgment accordingly.

DATED this 8th day of September, 1995.

/S/
JUDITH A. BOULDEN
United States Bankruptcy
Judge

THIS ORDER/JUDGMENT
ENTERED
SEP 8 1995
DEPUTY CLERK
U.S. BANKRUPTCY COURT

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:	:	
	:	
HAL TAYLOR,	:	Bankruptcy Number 92B-24610
	:	
Debtor.	:	[Chapter 7]
	:	
STEPHEN W. RUPP, Trustee,	:	Adversary Proceeding Number
	:	94PB-2090
Plaintiff,	:	
	:	
v.	:	
	:	
JULIA W. TAYLOR,	:	
	:	
Defendant.	:	

JUDGMENT

This is an adversary proceeding in which Stephen W. Rupp, plaintiff herein and the Chapter 7 Trustee of this

chapter 7 estate, asserts that certain transfers made by Hal Taylor, the debtor herein, to Julia W. Taylor, his wife, are fraudulent pursuant to Utah Code Ann. §§ 251-4 to 25-1-14 (1984), §§ 25-6-1 to 25-6-13 (1988), and/or 1 1 U.S.C. § 548; for declaration that the estate has an equitable undivided one-half interest in the transferred property; for imposition of a trust for the benefit of creditors; and to quiet title.

The court heard the evidence and arguments of counsel, considered the credibility of the witnesses, made an. independent analysis of applicable case law and considered post-trial memoranda filed by the parties. The court entered Findings of Fact and Conclusions of Law dated September 8, 1995, determining that the Trustee is entitled to judgment on behalf of the estate quieting title to the estate's interest in certain real property; to the imposition of a resulting and constructive trust over the estate's one-half undivided interest in the real property; and further that the estate was entitled to a money judgment against Julia W. Taylor for the value of the estate's undivided one-half interest in the proceeds from the sale of a 1990 Jeep Wagoneer.

Based thereon, the court hereby enters judgment in favor of Stephen W. Rupp, Chapter 7 Trustee of the estate of Hal Taylor, and it is hereby:

ORDERED, ADJUDGED AND DECREED, that title to the estate's undivided one-half interest in the real property described herein is hereby quieted in this chapter 7 estate for the benefit of the creditors of Hal Taylor. Said real property located in Summit County, State of Utah, is described as follows:

Lot 40, Thaynes Canyon Subdivision, according to the plat thereof or, file and of record in the office of the County Recorder of Summit County, Utah, subject to easements and restrictions of record or enforceable in law and equity.

And, it is further

ORDERED, ADJUDGED AND DECREED, that Stephen W. Rupp, Chapter 7 trustee, is authorized to record appropriate documentation with the Summit County Recorder establishing a constructive and resulting trust in the estate's undivided one-half interest in the above described real property currently titled in the name of Julia W. Taylor, until such time as the claims of this estate a-re satisfied, and it is further,

ORDERED, ADJUDGED AND DECREED, that judgment is hereby granted in favor of the chapter 7 estate, against Julia W. Taylor, for $5,743.50 representing the estate's interest in one-half the value of a 1990 Jeep Wagoneer.

DATED this 8th day of September, 1995.

/S/
JUDITH A. BOULDEN
United States Bankruptcy Judge

Supreme Court, U.S.
FILED
AUG 19 1998
OFFICE OF THE CLERK

No. 98-0117

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

In re HAL TAYLOR,
Debtor.

STEPHEN W. RUPP, TRUSTEE,
Petitioner,
v.
JULIA TAYLOR,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should accept Certiorari on the premise that the determination of equitable property interests is a question of fact, when the United States Court of Appeals for the Tenth Circuit and the United States Bankruptcy Court determined that it is a conclusion of law.

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JULIA TAYLOR,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS

Article XXII, § 2, Utah Constitution, expressly provides that

> Real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.

STATUTES

11 U.S.C. § 541(a)(1) provides as follows:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

Section 30-2-1, Utah Code Annotated, provides as follows:

> Real and personal estate of every female acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance, bequest or devise, shall be and

remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.

Section 30-2-3, Utah Code Annotated, provides as follows:

A conveyance, transfer or lien executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons.

Section 30-2-5, Utah Code Annotated, provides as follows:

(1) Neither spouse is personally liable for the separate debts, obligations, or liabilities of the other:

(a) contracted or incurred before marriage;

(b) contracted or incurred during marriage, except family expenses as provided in Section 30-2-9;

(c) contracted or incurred after divorce or an order for separate maintenance under this title, except that the spouse is personally liable for that portion of the expenses incurred on behalf of a minor child for reasonable and necessary medical and dental expenses, and other similar necessities as provided in a court order under Section 30-3-5, 30-4-3, or 78-45-7.15, or under an administrative order under Section 62A-11-326; or

(d) ordered by the court to be paid by the other spouse under Section 30-3-5 or 30-4-3 and not in conflict with Section 15-4-6.5 or 15-4-6.7.

(2) The wages, earnings, property, rents, or other income of one spouse may not be reached by a creditor of the other spouse to satisfy a debt, obligation, or liability of the other spouse, as described under Subsection (1).

Section 75-2-201, Utah Code Annotated, provides in pertinent part as follows:

(1) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate multiplied by a fraction, the numerator of which is the value of the decedent's marital property as defined in Subsection 75-2-202(2) and the denominator of which is the sum of:

(a) the value of the estate undiminished by funeral and administration expenses, homestead, family allowances, and exemptions or enforceable claims; and

(b) the amounts referred to in Subsections 75-2-202(1)(a) and (b) under the limitations and conditions provided for in this part.

. . . .

(3) Any determination concerning title to, or the validity of a document concerning, real property in this state, including without limitation a determination of the value of the consideration received by the decedent or a determination of

whether any subsequent grantee was a bona fide purchaser, shall be governed by Title 57.

Section 75-2-202(1)(a), Utah Code Annotated, provides in pertinent part as follows:

(1) The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts: -

(a) The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during the most recent marriage to the surviving spouse, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(i) Any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

. . . .

(iv) Any transfer to a donee made within two years of the death of the decedent to the extent that the aggregate transfers to that donee in either of the years exceed $3,000.

Any transfer is excluded if made with the written consent or joinder of the surviving spouse. . . .

Section 75-2-204, Utah Code Annotated, provides as follows:

> The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after the marriage, by a written contract, agreement, or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

Section 75-2-401, Utah Code Annotated, provides as follows:

> A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of $10,000. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to $10,000 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over, all claims against the estate, except claims for reasonable funeral expenses and expenses of administration.

The homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by intestate succession, but is chargeable against any share passing by the will of decedent, unless the will provides otherwise.

Section 78-23-4, Utah Code Annotated, provides in pertinent part as follows:

(4) If an individual is married, no conveyance of or security interest in, or contract to convey or create a security interest in property recorded as a homestead prior to the time of such conveyance, security interest, or contract shall be valid, unless both the husband and wife join in the execution of the conveyance, security interest, or contract.

STATEMENT

Introduction

The primary issue herein is whether the trustee should be able to take a home from Julia Taylor ("Judy"), who has resided therein for twenty-five years, and has held title to the home solely in her name for ten (10) years before this action was commenced. The Tenth Circuit Court of Appeals correctly determined that the law prohibits this taking of property.

The trustee attempts to obtain this Court's review by misstating his central issue, i.e. he asserts that the Tenth Circuit erred by reversing a finding of fact made by the Bankruptcy Court. This alleged finding was the determination of whether Hal Taylor ("Hal") had an equitable interest in

property titled in Judy's name. Yet, even the lower court determined this issue to be a conclusion of law, not a finding of fact. (App. 52a-53a). The trustee has not identified a finding that was reversed. The Tenth Circuit decided that the Bankruptcy Court reached incorrect conclusions by wrongly applying the law. (App. 13a, 15a).

Background

In November, 1973, Hal and Judy, husband and wife, purchased a home. (App. 26a[1]). The Taylors acquired the home in joint tenancy. It had an original mortgage amount of $56,000.00. (App. 26a).

In 1982, Hal suffered a massive coronary. Hal's brother had died of a heart attack and his widow had to sell their home due to problems with the estate (Tr.P.103L4-13). Concerned about his own health, Hal wanted to insure that in the event of his death, Judy and their minor son, Cody, would be protected. (Tr.P.53L3). (App. 26a-27a).

In May 1985, Hal gifted to Judy his 1/2 undivided interest in the home. The gift was accomplished by recordation of a Warranty Deed, which conveyed Hal's interest in the property to Judy. (App. 27a). Hal was a real estate broker and knew the significance of a transfer by Warranty Deed. (App. 22a, 25a).

Hal testified that conveyed the property for estate planning and because his family had a history of heart disease. (App. 27a).

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[1] References herein to "App." are references to Petitioner's Appendix.

At the time of the transfer, Hal was a defendant, however, he satisfied the judgment without delay. (App. 27a).

Hal was not insolvent at the time of the transfer. (App. 27a, 41a). The transfer was not made with actual intent to hinder, delay, or defraud creditors. (App. 41a). The transfer was not a fraudulent conveyance. (App. 37a-42a, 45a-46a).

In 1985, Judy used $25,000 from her personal inheritance to pay off the mortgage on the home (Tr.P.52L25). (App. 27a, 41a).

In 1986, Hal was elected Mayor and served until 1989. (App. 5, 23a). During his term, Hal's real estate business became inactive and his income declined. His monthly net income as mayor was $600.00. (App. 23a). In 1989, Hal suffered a stroke which left him crippled and unable to work. (App. 5, 24a). In 1992, Hal began receiving Social Security. (App. 26a).

In 1992, Hal had to file a Chapter 7 Bankruptcy. (App. 30a). After he filed, Hal learned that three lots, on which he had believed the bank had foreclosed, were not in the bank's security. Consequently, the lots had not been listed as property of the debtor. The lots were offered to the original trustee, Harriet Styler, as ability to pay in full the one creditor.

The lots have been sold and the trustee holds $37,500.00. The debtor obtained the buyers for the three lots. The trustee has obtained additional property of the estate.

There is one creditor with a claim of less than $30,000.00. (App. 5, 29a, 30a).

The trustee and his counsel have filed fee applications exceeding $250,000.00. Yet, the three lots were sold and sufficient proceeds were received to fully satisfy the creditor. (¶ ¶ 9-16, Affidavit of trustee filed in Response to Motion for Emergency Stay, which was filed by Judy with the Tenth Circuit Court of Appeals.)

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE ULTIMATE DETERMINATION OF WHETHER HAL HAD AN EQUITABLE INTEREST IN PROPERTY IS A CONCLUSION OF LAW

The trustee's assertion that the Court below abused its authority when it decided that resolution of ownership of equitable property interests is a conclusion of law does not warrant review by this Court. The trustee recognizes that he cannot succeed unless he can persuade this Court that this issue is a question of fact. Yet, the Court of Appeals, and the Bankruptcy Court, found it to be a conclusion of law. The Tenth Circuit did not reverse a finding of fact made by the Bankruptcy Court.

The findings are in the Appendix provided by the trustee on pages 22a through 37a. They include the normal demonstrations of fact, things that can be seen, touched, smelled, heard; that are events or happenings. See Black's Law Dictionary, p. 591 (6th ed. 1990). The findings do not contain a statement by the Bankruptcy Court that Hal retained an equitable interest in Judy's home. This determination is stated in the Conclusions of Law.

II. THE TENTH CIRCUIT CORRECTLY HELD THAT THE BANKRUPTCY COURT WRONGFULLY IMPOSED A RESULTING TRUST BY INCORRECTLY APPLYING THE LAW

The decision of the Bankruptcy Court is against the overwhelming legal authority applicable to this case and the Tenth Circuit reversed the determination on that basis. The Court of Appeals noted that

> A bankruptcy estate includes 'all legal or equitable interests of the debtor in property as of the commencement of the case.' 11 U.S.C. § 541(a)(a). The existence and extent of such an interest is determined by state law, in this case the law of Utah. See e.g. United States v. Rodgers, 461 U.S. 677, 683, 690-91 (1983).

The law in Utah is clear. Utah was the first state in the nation to grant a woman the Constitutional right to own property. Article XXII, § 2, Utah Constitution, expressly provides that

> Real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.

(Emphasis added.) Also, the Utah Legislature enacted § 30-2-1, Utah Code Annotated, which duplicates the Constitutional provision contained in Article XXII, § 2, Utah Constitution. The Legislature strengthened the rights of women to own their own property by adding protections to those rights. Section 30-2-3, Utah Code Annotated, provides that "a conveyance, transfer or lien executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons." (Emphasis added). Finally, the Legislature stated that

> (1) Neither spouse is personally liable for the separate debts, obligations, or liabilities of the other:
>
> (b) contracted or incurred during marriage, except family expenses as provided in Section 30-2-9;
>
> (c) ordered by the court to be paid by the other spouse under Section 30-3-5 or 30-4-3 and not in conflict with Section 15-4-6.5 or 15-4-6.7.
>
> (2) The wages, earnings, property, rents, or other income of one spouse may not be reached by a creditor of the other spouse to satisfy a debt, obligation, or liability of the other spouse, as described under Subsection (1).

(Emphasis added).

Accordingly, Utah law is clear on a woman's right to own property without it being subject to claims of her husband's creditors, notwithstanding that she acquired it from her husband during marriage. The

only limitation is to claims of creditor's that are based on family or household purposes. In the present case, Judy held the property in her name and was listed as the owner on the deed and the tax records. The evidence proved that Judy provided a major portion of the household income after the transfer of the property into her name. The claim in the bankruptcy case of Hal Taylor is not for family or household purposes. Certainly, the creditor had no legitimate expectation that Judy's property would be available for debts owed by Hal.

The lower court held that Hal owned an equitable interest in this property based upon its determination that facts supported the imposition of a "resulting and/or constructive trust". To impose a resulting trust, the movant must prove that a trust was intended. In re Taylor, 133 F.3d 1336, 1341 (10th Cir. 1998). Generally, if one party purchases property and titles it in another party's name, it is presumed that a trust was intended. Id. An exception to this general rule applies, however, when the parties are married. Section 442 of the Restatement (Second) of Trusts, states:

> Where a transfer of property is made to one person and the purchase price is paid by another and the transferee is a wife, child or other natural object of bounty of the person by whom the purchase price is paid, a resulting trust does not arise unless the latter manifests an intention that the transferee should not have the beneficial interest in the property.

To impose a resulting trust, the trustee was required to prove, by clear and convincing evidence, that Hal intended to retain an interest at the time he made the transfer. In re Taylor, 133 F.3d at 1341 (quoting Chambers v. Emery, 13 Utah 374, 45 Pac. 192, 195 (1896) and Restatement (Second) of Trusts § 443 comment a).

The Tenth Circuit noted that the Bankruptcy Court found Hal to be "a real estate broker who 'understands real estate transactions'" and that the Taylors "'testified that they transferred legal title because of estate planning and inheritance tax concerns after [Harold's] heart attack.'" In re Taylor, 133 F.3d at 1341. Yet, the Bankruptcy Court used subsequent conduct to infer that Hal never intended to convey all of his property.

Accordingly, the Tenth Circuit ruled:

> there is no basis for the bankruptcy judge's determination that the facts rebut the presumption that when a husband pays (or here, signs over his interest) for property that is placed in his wife's name, he intends a gift. In fact, Harold's act of conveying his interest was more deliberate because he and Julia already held title to their home jointly. The Taylors' explanation -- that Harold had seen his brother's widow experience difficulty selling a home that had been co-owned, that he had heart trouble and wanted to ensure Julia would have the home if he died -- while perhaps not a

model of legal reasoning must have been discounted for the judge to have reached her conclusion.

> The Bankruptcy Judge appears to have adopted a per se rule that when a husband conveys to his wife his interest in the home but intends to continue to reside there and help pay real estate taxes, insurance, and other household bills that accrue, he intends to continue to hold a fifty percent beneficial interest in the property.

In re Taylor, 133 F.3d at 1341-42. Such a per se rule adopted by the lower court directly contravenes the law stated by § 442 of the Restatement (Second) of Trusts, and as applied in Utah cases. See Parks v. Zions First National Bank, 673 P.2d 590 (Utah 1983). It violates Article XXII, § 2, Utah Constitution, as well as § § 30-2-1, et seq., Utah Code Annotated. It fails to follow the law requiring determination of intent at the time of the transfer.

Finally, the Tenth Circuit held that, "[a]s a practical matter such a rule would prevent transfers of title to the home between spouses to accomplish such objectives as avoiding probate and arranging the two estates to take advantage of the estate and inheritance tax laws exemptions." In re Taylor, 133 F.3d at 1342 (citing 26 U.S.C § § 2001(c), 2010(a) as examples). Like in the case of Parks v. Zions First National Bank, 673 P.2d 590 (Utah 1983), the Bankruptcy Court should have rejected the request to impose a resulting trust.

In Pate v. U.S. Dept. of Treasury I.R.S., 949 F.2d 1059 (10th Cir. 1991), the Tenth Circuit held that "[w]hen a husband purchased property for his wife, not only is the resulting trust presumption inapplicable, but the wife is entitled to the opposing presumption that the property is hers alone by way of a gift or advancement." Id. at 1061. Further, "[t]he presumption against a resulting trust arising out of the 1975 acquisition controls unless rebutted by clear and convincing evidence, Fletcher [v. Fletcher], 244 P.2d 827, 830 (Okl. 1952); King [v. Courtney], 122 P.2d 1014, 1015 (Okl. 1952)." Id. See also Utah cases: Furniture Mfrs. Sales, Inc. v. Deamer, 680 P.2d 398, 399 (Utah 1984); Meyer v. General Amer. Corp., 569 P.2d 1094, 1096 (Utah 1977); Territorial Sav. & Loan Ass'n v. Baird, 781 P.2d 452 (Utah App. 1989).

In Pate, 949 F.2d 1059, Whit Pate provided the sole family income and mortgaged the home in which he and his wife lived. He, however, transferred ownership to his wife by putting the deed in her name. Subsequently, the Court determined that Whit Pate did not own any interest in the property despite that he paid the mortgage, he took out other loans on the property and repaid them, his income was the sole family income and he continued to live in the home. Similarly, Pate, like Hal, transferred the home to his wife and a wife is allowed to receive property by gift and hold it as her own. That property is not subject to claims of her husband's creditors, including the claim of the IRS.

After the decision in Pate, the wife and children sought to obtain their costs of

litigation from the I.R.S. on the grounds that the litigation was without merit. On appeal, the Court of Appeals determined that the government had pursued a position that was not substantially justified and determined that if the wife and children satisfied the net worth requirements they would be awarded their litigation costs. Pate v. U.S., 982 F.2d 457 (10th Cir. 1993). "The government's position was not 'substantially justified' because although Mr. Pate was an unsavory character who had undisputed liabilities and no significant assets, under well settled Oklahoma law he did not have a property interest in the house." As in Utah, in Oklahoma there is a general presumption in favor of a resulting trust. Pate, 949 F.2d at 1060. Nevertheless, "'there is a well-established exception . . . [that] [w]hen a husband purchased his property for his wife, not only is the resulting trust presumption inapplicable, but the wife is entitled to the opposing presumption that the property is hers alone by way of gift or advancement." Id. at 1060-61. The government's position was unreasonable because the gift presumption was "triggered by" the very circumstances present in this case, id. at 1061, and there were no facts to rebut the gift presumption. Like the current case, the gift occurred prior to any liability of Mr. Pate.

III. THE TENTH CIRCUIT CORRECTLY HELD THAT THE LOWER COURT INCORRECTLY IMPOSED A CONSTRUCTIVE TRUST BECAUSE IT APPLIED THE WRONG LAW

The Tenth Circuit analyzed the imposition of a constructive trust by the Bankruptcy Court.

> "'A constructive trust is imposed not because of the intention of the parties but because the person holding title to property would profit by a wrong or would be unjustly enriched if [s]he were permitted to keep the property. A constructive trust, unlike an express or resulting trust is remedial in character.'"

In re Taylor, 133 F.3d at 1342 (quoting Restatement (Second) of Trusts at 326. Black's Law Dictionary, p. 1535, states the doctrine of unjust enrichment as follows:

> General principle that one person should not be permitted unjustly to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated.

Although the facts that can support imposition of a constructive trust are unlimited, those circumstances must be shown by clear and convincing evidence. In re Taylor, 133 F.3d at 1342; Nielson v. Rasmussen, 558 P.2d 511, 513 (Utah 1976). The situation must be considered from Hal's position, not his creditor's, "to determine whether it would be a wrong to Harold to let Julia keep the property." Id. "The bankruptcy judge already had found Harold transferred the property while he was solvent and not in anticipation of litigation." Id. There is no wrong to Hal or unjust enrichment to Judy. A constructive trust should not have been imposed.

The Tenth Circuit noted that the Bankruptcy Court heavily relied upon the case of Parks, 673 P.2d 590, to impose a constructive trust. This case, however, "is quite distinguishable from the case before us." In re Taylor, 133 F.3d at 1342. The factual situation in Parks and the facts of this case are extremely different. In Parks, Mrs. Parks was the bookkeeper and handled all paper work for the family. When property was acquired, she titled it in her name. This is a very important distinction. Mr. Parks never owned record interest in the property. He never took any action to gift the property to his wife. Mrs. Parks, therefore, was not entitled to the Constitutional or statutory protections involving her property received by gift. Mr. Parks was never able to exercise his right to retain an interest in the property.

In this case, Hal could have retained his interest, or at the time of his transfer, he could have retained some interest, such as a life estate, but he voluntarily chose not to do so, thereby demonstrating his donative intent to give his property to Judy.

Obviously, Hal intended that Judy own the beneficial interest in the property. In Parks, to impose a constructive trust and overcome the presumption of § 442 of the Restatement (Second) of Trusts, it was necessary to implement the application of § 160, Restatement of Restitution. Section 160 requires proof that the title holder was unjustly enriched by retention of the title.

The Tenth Circuit found the use of § 160 in Parks to be

> imminently reasonable. The court there prevented an injustice by applying equitable remedies where no trust intent existed. In contrast, in the case before us the supposed equitable owner is the one who made the gift, and he manifested no intent that his wife not have the legal and equitable title to the home. The fact that he paid real estate taxes, insurance and utility bills could certainly be seen as his contributing to the expenses in return for living in the home which she owned. Indeed, a Utah statute imposes on both husband and wife "'the expenses of the family' Utah Code Ann. § 30-2-9; many of these payments would surely fall into that category.

In re Taylor, 133 F.3d at 1342-43. The Court of Appeals held that the Bankruptcy Court applied Parks too broadly,

> adopting a per se rule that would effectively nullify any attempt by one spouse to transfer all right, title and interest in a home in which he or she continues to reside, at least if the grantor continues to pay any costs of the occupancy. We believe that is not the law of Utah.

Id. at 1343 (emphasis added). Consequently, the Tenth Circuit held that the lower court erred in its application of law and reversed

the determination that Hal had an equitable one-half interest. Id. at 1343. The Court of Appeals decision is consistent with, and applies, Utah law. Review is illogical.

IV. THE "TRANSCRIPT ISSUE" IS SUBTERFUGE; THE TRUSTEE SHOULD NOT BE ABLE TO USE THE ARGUMENT IN HIS ATTEMPTS TO PERSUADE THIS COURT TO REVIEW THIS CASE

a) The Tenth Circuit did not reverse any findings of fact made by the Bankruptcy Court. The Appellate Court accepted the lower court's findings, but reversed the application of law to those facts. This is the prerogative of the Appellate Court. Accordingly, whether the transcript was received by the Court of Appeals is not relevant to this Court's determination of whether to grant Certiorari in this case.

b) In addition, the transcript of the trial was designated as part of the record. The initial appeal of the Bankruptcy Court's decision was heard by the United States District Court for the District of Utah. The docket demonstrating the record that was transferred from the Bankruptcy Court to the District Court includes the following items:

> 06/12/95 -- Transcript of Hearing Held on 05/25/95 Transcript ID: 737 (closing Arguments) (hph) [EOD 09/08/95]
>
> 08/28/95 -- Transcript of Hearing Held on 5/25/95 Transcript IDL 739 (hph) [09/08/98]
>
> 08/30/95 -- Transcript of Hearing Held on 5/25/95 Transcript ID: 738 (hph) [09/08/95]

When the appeal was filed with the Tenth Circuit, the entire record from the District Court was designated. The Transcript Order Form was marked as follows:

> I HAVE NOT ORDERED A TRANSCRIPT BECAUSE
>
> . . . .
>
> [X] The necessary transcript is already on file in District Court.

Judy is unaware of any reason precluding transfer of the transcript.

Finally, each party cited to the transcript to support the facts in their briefs. The Appellate Court stated that it did not have the transcript, In re Taylor, 133 F.3d at 1340-41, however, the Court accepted the facts found by the lower court and those undisputed by the parties. The issue of the transcript is a mystery, however, it is irrelevant. The Appellate Court's reversal of the lower court's decision was based on the lower courts' rulings on, and applications of, the law.

III. THE COURT OF APPEALS DID NOT INTRODUCE OR FIND NEW FACTS

The trustee inappropriately asserts that the Tenth Circuit "introduced and found facts not at issue and concerning which no evidence was ever presented."

a) The trustee asserts that "matters of estate and inheritance tax planning . . . were never the subject of nor issues in this case or appeal." Brief, p. 10. Clearly, estate planning was at issue when the "Taylors testified the conveyance was made for estate planning purposes". (App. 27a).

Further, this issue has been argued in every brief since the initial appeal. The trustee's assertion is disingenuous at best.

b) The trustee asserts that the Court of Appeals made a finding of fact that "any financial institution loaning money on the security of a home would require a consent or guarantee by a spouse of the title holder because of the spousal elective share and homestead exemptions law." Brief, pp. 10-11. Yet, this statement simply recognizes Utah law, which has been asserted by Judy from the trial and throughout the appeal.

The Tenth Circuit Court noted that, in Utah, upon the death of one spouse, the other spouse has a right to elect a spousal share of the estate. The right does not arise until death, however, the law requires that any waiver or subrogation of the right in writing and signed by the spouse. See § § 75-2-201, 75-2-202, 75-2-401, Utah Code Ann. Accordingly, the Tenth Circuit noted that if a mortgage holder wanted to retain priority interest over a surviving spouse, the bank likely would require the signature of both spouses, even though one spouse does not own the property. This is a natural conclusion from the law and is not a finding of fact.

Also, the Appellate Court noted that a resident in a home can claim a homestead exemption, even if not an owner, which exemption cannot be waived without a written document. See § § 78-23-3, 78-23-4, Utah Code Ann. Again, an inherent assumption is that a bank would require signatures of both spouses, even though one spouse does not own the property. This is a natural conclusion from the law and is not a finding of fact.

c) The Trustee asserts that the Tenth Circuit disregarded the "finding" of the Bankruptcy Court that the property was marital property. First, whether property is marital is a question of law. Thus, if the Appellate Court did "disregard" this "finding" it was entitled to do so. Second, the determination of what is marital property in Utah is made on a case by case basis, but generally does not include property received by gift or inheritance. The trustee failed to cite one case supporting his assertion that Judy's home would be found to be marital property. The two cases cited by the trustee, Hoagland v. Hoagland, 852 P.2d 1025 (Utah App. 1993) and Hogue v. Hogue, 831 P.2d 120 (Utah App. 1992), are not applicable to the facts in this case. In Hoagland and Hogue, the divorce court found the property to be marital property because it had been transferred to wives to avoid husbands' creditors. Thus, facts existed to avoid the transfers based upon fraudulent conveyance theories and resulting trust theories. In this case, the lower court ruled against the trustee on the fraudulent conveyance theories. The Appellate Court ruled against the trustee on the trust theories because the lower court had improperly applied the law. The Appellate Court did not disregard a "finding" of the lower court.

d) The trustee erroneously asserts that the Appellate Court "ignored findings that constituted 'badges' of ownership." Brief, p. 13. In fact, the Tenth Circuit acknowledged these findings of fact made by the Bankruptcy Court. The Court of Appeals, however, applied the correct law to the facts and reached a different conclusion. The trustee really is arguing that the Tenth

Circuit Court erred as a matter of law, however, he realizes that the Appellate Court applied the correct law. In addition, even the lower court found that the trustee did not prove adequate "badges of fraud" to succeed on his claims. Consequently, again, the trustee attempts to label conclusions of law as findings of fact to try to obtain unnecessary review by this Court.

e) The trustee asserts that the Appellate Court failed to give sufficient weight to the "behavior of ownership" demonstrated by Hal. Again, it is the trustee who fails to acknowledge the applicable law. The Taylors are married. Hal transferred the property when he was solvent. He proved that the reason for the transfer was estate planning and that facts existed to support this intent. The Tenth Circuit did not "grossly underweigh" this "badge of ownership"; the Appellate Court applied the correct law to the facts and reversed the holding of the lower court.

V. THE TENTH CIRCUIT CORRECTLY HELD THAT THE IMPOSITION OF THE TRUSTS BY THE BANKRUPTCY COURT WAS IMPROPER, AND THUS, HAL HAD NO EQUITABLE INTEREST IN THE PROPERTY

The trustee appears to assert that the Tenth Circuit was wrong when it focussed on whether the Bankruptcy Court correctly imposed a trust against Judy's property. The trustee seems to forget legal principles. He argues that the Appellate Court should have found that Hal had an equitable interest and, then, the trusts could have been imposed. The legal system does not work this way. First, a claimant must plead and prove his cause of action.

Second, a remedy may be awarded. Third, the Appellate Court will decide whether the lower court found the right legal solution. In this case, the lower court granted the trustee the interest in Judy's property based upon its imposition of the trusts. Clearly, a court cannot simply declare that a party has an equitable interest in property without the movant proving a claim that gives him an equitable interest.

IV. THE TENTH CIRCUIT DID NOT MISAPPREHEND THE POLICY AT STAKE IN THIS CASE

The trustee argues that the policy herein is to preclude "the avoidance of creditors through the manipulation of legal title". Brief, p. 18. Thus, he asserts, it is wrong for the Appellate Court to let Hal continue to live in the property. First, the Bankruptcy Court held that Hal did not transfer the property with intent to hinder, delay, or defraud creditors; in fact, the Court found that there were no creditors at the time of the transfer. This is not a case where the conveyance was wrongful, fraudulent, or otherwise voidable. The Tenth Circuit did not misapprehend the policy, it simply disagreed with the lower court and the trustee in the assertion that any transfer between spouses is voidable.

The reliance on the case of Leach v. Anderson, 535 P.2d 1241 (Utah 1975), is misplaced. In Leach, a trust was set up for the sole benefit of the trustor during her lifetime. That is not the present case. The transfer by Hal was for the sole benefit of Judy and Cody and was done for estate planning. Hal continued to live with his family; it obviously is not a prerequisite to the use of a home that a party own the

property. The trustee is the party who misapprehends the policy in this matter. A husband and wife are entitled to decide ownership of their property. If a conveyance does not fit within the confines of a legal cause of action offering the remedy requested by the trustee, he is not entitled to set it aside.

VII. THE COURT OF APPEALS DID NOT DENY THE TRUSTEE DUE PROCESS

Unfortunately, due process, which is a very important right held by the American citizenry, is both misused and overused by losing parties in a legal action. That is the case we have here. The trustee asserts that he was denied due process because several issues were raised for the first time in the Appellate Opinion. Nothing is further from the truth. The response for each issue raised by the trustee follows:

a) The determination of an equitable property interest is an issue of law. Originally, the issue was decided by the Bankruptcy Court as a conclusion of law. The issue was raised with the Complaint that initiated this action. The trustee's assertion that the issue was first raised by the Tenth Circuit is erroneous.

b) The trustee asserts that the Tenth Circuit raised for the first time the issue of whether the lower court was attempting to adopt a per se rule. The Tenth Circuit stated that it appeared that this was what the lower court did. It was just a comment and part of the Court's analysis. The Tenth Circuit did not violate due process.

c) The issue of whether the finding of an equitable property interest of a debtor would prevent transfer of title to the home between spouses for tax and estate planning purposes has been in this case since the trial. Hal testified that this was his purpose for transferring the property. Further, the specific issue was raised in the Motion for Emergency Stay filed by Judy with the Tenth Circuit and to which the trustee filed a response.

d) The issue regarding financial institutions requiring both spouse's signatures has been addressed previously, and expressly was presented in Judy's Brief to the Tenth Circuit at page 11. No violation of due process occurred.

e) The issue of the transcript is perplexing. This has been addressed above. The Appellate Court did not violate due process. There was no change in any of the accepted facts. The questions before the Appellate Court all concerned issues of law.

The trustee should have been acquainted with these issues before the Tenth Circuit published its opinion. The trustee was not denied due process, he had notice and opportunity to be heard on each issue.

VIII. THE COURT OF APPEALS DID NOT VIOLATE FUNDAMENTAL RULES OF APPELLATE REVIEW

The argument that the Court of Appeals violated fundamental rules of appellate review is premised on the false assumption that the Court of Appeals set aside the Bankruptcy Court's findings of fact. It did not. The Appellate Court reversed the lower

court's Conclusions of Law as pertaining to the claimed equitable property interest of Hal. Consequently, the transcript was not necessary. See Estate of Cusick v. Englesath, 842 P.2d 934 (Utah 1992); Prudential Capital Group Co. v. Mattson v. Key Airline, 802 P.2d 104 (Utah 1990).

CONCLUSION

The Tenth Circuit Court of Appeals held that the Bankruptcy Court erred in its application of law and in reaching its conclusions of law. The Appellate Court did not reverse any finding of fact made by the lower court. The trustee was not denied due process. He had notice and opportunity to defend each and every issue presented in this case. The trustee cannot be allowed to manipulate the record by asserting, for the first time, that the determination of equitable property interests is a question of fact rather than a question of law. The trustee is wrong.

The Tenth Circuit correctly applied the law to determine that Judy, a married woman, is entitled to own her own property, even if it was given to her by her husband during their marriage. She does not need to get divorced from that husband, or to reside separately, to own property. The trustee failed to demonstrate that the transfer could be set aside. The trustee failed to demonstrate that Hal intended, at the time of the conveyance, to continue to own the property even though he had transferred it to Judy. The trustee failed to show that Judy would be unjustly enriched by retention of her own property. It is the trustee who is attempting to violate this right given to women in the State of Utah decades ago.

Article XXII, § 2, Utah Constitution, expressly provides that

> Real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.

Judy can own her property and this property is not subject to the claims of Hal's creditors. The Tenth Circuit Court of Appeals was correct in its determination.

There is no basis upon which this Court should review this case and the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 19th day of August, 1998.

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Attorneys for Julia W. Taylor

Supreme Court, U.S.
FILED
SEP 21 1998
OFFICE OF THE CLERK

(3)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No. 98-0117

In re: HAL TAYLOR,

Debtor.

STEPHEN W. RUPP, TRUSTEE,

Petitioner,

v.

JULIA TAYLOR,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY TO BRIEF IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit went beyond the limits and abused the powers of appellate review.

Whether the United States Court of Appeals for the Tenth Circuit erred as a matter of law in concluding that the determination of equitable property interests is a conclusion of law rather than an issue of fact.

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REPLY TO BRIEF IN OPPOSITION

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. PORTIONS OF THE RESPONDENT'S STATEMENT OF BACKGROUND ARE UNSUPPORTED OR INACCURATE.

The Respondent's recitation of background is, in great part, unsupported or inaccurate. There are several references to "Tr." which are not a matter of the record on appeal to the United States Court of Appeals for the Tenth Circuit (hereafter "Court of Appeals") and not a matter of any appendix submitted to this Court.

The ninth, tenth and twelfth paragraphs of the Respondent's "Background" have no references to the record on appeal or an appendix and were not facts ever considered in this proceeding.

In several instances, the Respondent's statement of background is subtlety, but significantly, inaccurate. For example, the Respondent states, "There is one creditor with a claim of less than $30,000.00." This statement misstates the amount of the claim and the fact that Mr. Taylor scheduled only one creditor and omits administrative claims in the case.

II. THE DETERMINATION OF AN EQUITABLE INTEREST IN PROPERTY IS ULTIMATELY AN ISSUE OF FACT.

The determination of an equitable or beneficial interest in property is an issue of fact, not law. A close review of the

Court of Appeals' decision demonstrates just how fact intensive this issue is. Quoting selected and pertinent parts:

> "We may not set aside the bankruptcy judge's fact findings unless they are clearly erroneous . . . The appellate record does not contain a transcript of the testimony presented to the judge. . . We turn our attention first to whether the bankruptcy judge correctly imposed a 'resulting trust'.
>
> . . .
>
> "In reviewing this determination we must keep in mind that the proof required to impose a resulting trust 'must be strong, clear and convincing, such as to leave no doubt of the existence of the trust, . . . So viewed, there is no basis for the bankruptcy judge's determination that the facts rebut the presumption [of]. . . a gift . . . .As a practical matter, such a rule would prevent transfers. . . We are satisfied Harold's intention to continue to live with his wife on the premises and to pay a portion of the bills incurred during that occupancy does not establish clear and convincing proof of his intention to retain an ownership interest in property that he conveyed to his wife for estate planning purposes."
>
> . . .
>
> We turn next to whether the bankruptcy judge correctly imposed a 'constructive trust' . . .[T]he circumstances requiring imposition of a constructive trust must be found to exist by 'clear and convincing evidence'. . .[H]e [Harold] manifested no intent that his wife not

> have the legal and equitable title to the home. The fact that he paid real estate taxes, insurance and utility bills could certainly be seen as his contributing to the expenses in return for living in the home which she owned . . .[A]ny financial institution would require a consent or guarantee by a spouse of the title holder because of the spousal elective share and homestead exemptions law. . .There were no 'badges of fraud' in this case.
>
> . . .
>
> We thus reverse the finding that Harold Taylor had an equitable one-half undivided share in the Park City property." (Underlining added.) (App.10a-16a.)

From the Court of Appeals' decision, the following becomes evident:

(1) The Court of Appeals concluded that the determination of an equitable interest was dependent on finding either a constructive or resulting trust.

(2) The finding of a trust was dependent on clear and convincing evidence.

(3) Even though the record on appeal did not enable the Court of Appeals to review the evidence considered by the bankruptcy judge, the evidence, whatever it might have been and which was found by the bankruptcy court to be clear and convincing, was not clear and convincing in the opinion of the Court of Appeals.

(4) Though it had no record on appeal, the Court of Appeals made new findings evident from the statements underlined above.

The Court of Appeals overturned the bankruptcy judge on the grounds that the evidence found to be clear and convincing by the bankruptcy judge was not clear and convincing to the satisfaction of the Court of Appeals notwithstanding the Court of Appeals had no record on appeal to consider.

III. THE COURT OF APPEALS IGNORED THE FINDING OF MARITAL PROPERTY.

As fully discussed in the Petitioner's petition, the Court of Appeals ignored the bankruptcy judge's finding of marital property and relevant Utah law. Respondent attempts to distinguish the cases of *Hoagland v. Hoagland,* 852 P.2d 1025 (Utah App. 1993) and *Hogue v. Hogue,* 831 P.2d 120 (Utah App. 1992). Both of these divorce cases concerned the husbands' marital property interests in real properties which they had previously and intentionally deeded to their divorcing wives. In both cases, an award of a real property interest to the husband by the trial court was affirmed on appeal.

In attempting to distinguish these cases, the Respondent states, "In *Hoagland* and *Hogue*, the divorce court found the property to be marital property because it had been transferred to wives to avoid husbands' creditors. Thus, facts existed to avoid the transfers based upon fraudulent conveyance theories and resulting trust theories." This statement by the Respondent is inaccurate and misleading.

The trial courts did not determine the real properties to be marital properties because they had been deeded to the wives to avoid creditors or based on fraudulent conveyance or trust theories or claims. Pursuit of such claims would have been incongruous since a transferor cannot attack or impeach his own transfer as a fraudulent conveyance. These cases are purely marital property cases where the husbands asserted equitable, beneficial, marital real property interests and claims even though they had previously and purposefully transferred title to the real properties to their wives.

The only difference between the *Hoagland* and *Hogue* transfers and the Taylor transfer is the purported reason for the deed. In *Hoagland* and *Hogue*, the transfers were done to prospectively avoid creditors. In the present case the transfer was purportedly done for prospective estate and inheritance tax planning. In none of these cases is there any evidence of any present intent at the time of the deed to actually transfer property. In all three cases, the only change after the deed is the name on the title. To conclude that there was a transfer of any more than bare legal title is to elevate form over substance.

The need to address marital property interests is unavoidable when a bankruptcy case is filed by only one spouse. The bankruptcy estate includes all property interests, legal and equitable. This breadth includes marital property. Property of the bankruptcy estate of one spouse will virtually always include marital property in which the non-debtor spouse also has an interest. In essence, the bankruptcy filing by one spouse results in a financial or property divorce requiring a legal and equitable division of marital property between the bankruptcy estate of the debtor and the non-debtor spouse. There is no doubt that if Hal Taylor and Julia Taylor

divorced, Mr. Taylor would be entitled, under Utah law, to a fair share and interest in the Park City home.

The Court of Appeals improperly ignored the bankruptcy court's finding of marital property under Utah law.

IV. NEITHER UTAH HOMESTEAD EXEMPTION OR PROBATE LAW REQUIRED THAT HAL TAYLOR JOIN IN THE PLEDGE OF THE PARK CITY HOME.

Findings of fact by the bankruptcy court included the facts that both Hal and Julia Taylor were liable on, used, and made payments on a Line of Credit obtained in March of 1989, well after the transfer of title to Ms. Taylor. The Line of Credit was secured by a pledge of the Park City Home by both Taylors. The bankruptcy court considered this use and treatment of the Park City home one of many facts that exhibited Mr. Taylor's continuing equitable interest in the Park City home.

To excuse the pledge of the home by Mr. Taylor, the Court of Appeals and the Respondent argue that Utah homestead and probate laws compelled the lender to require that Mr. Taylor join in the pledge of the home to avoid jeopardy to the priority or standing of the loan against the home. This argument is flawed for the following reasons:

First, even if the law gave reason that Mr. Taylor join in the pledge of the home, this does not explain his incurring of the liability, his receipt of the loan proceeds, and his participation in the repayment of the secured Line of Credit. (App. 28a.)

Second, neither the Court of Appeals or the Respondent demonstrate in this case that the application of the homestead or probate laws would jeopardize the priority or standing of an enforceable, consensual lien to the lender.

Third, even if the laws did jeopardize an enforceable, consensual lien, there was no evidence that lenders require or that the lender in this case required the consent or guarantee of the spouse of the title holder. This finding by the Court of Appeals was unsupported supposition. The evidence might as likely have demonstrated that Mr. Taylor was willing to admit and pledge his ownership of the home in order to obtain the loan, nearly $30,000.00 of which was placed into the H.W. Taylor account. (App. 28a.)

In conclusion, the Court of appeals improperly, and well beyond its prerogative, drew its own finding of fact even though there was no evidence.

V. INTENT AT THE TIME OF THE TRANSFER CAN BE SHOWN BY CONDUCT AFTER THE TRANSFER.

The Respondent and Court of Appeals are critical of the fact that "the Bankruptcy Court used subsequent conduct to infer that Hal never intended to convey all of his property." The consideration of subsequent conduct is totally appropriate.

Section 443 of the *Restatement of Trusts 2d*, which concerns rebutting the presumption of a gift to a relative, states in Comment "a", "The conduct of the payor and of the transferee subsequent to the transfer, however, may be such as to show that at the time of the transfer the payor did not intend to make a gift to the transferee. Thus, the fact that the payor

manages the property, collects rents, pays taxes and insurance, pays for repairs and improvements, or otherwise asserts ownership, and the acquiescence by the transferee in such assertion of ownership, is evidence to rebut the inference of an intention by the payor to make a gift to the transferee."

Contrary to the Restatement, the Court of Appeals specifically found that the payment of real estate taxes, insurance and utility bills, cosigning and pledging the property to secure new debt or credit, payment of the debt secured by the property, and continuing to live in the property was not conduct sufficient to rebut a presumption of an absolute gift. This finding by the Court of Appeals is contrary to the Restatement and further demonstrates how the Court of Appeals drew its own findings of fact .

VI. THERE WAS NO EVIDENCE THAT A FINDING OF AN EQUITABLE INTEREST WOULD IMPAIR ESTATE AND INHERITANCE TAX PLANNING.

Whether a finding and declaration of an equitable property interest in a bankruptcy (creditor-debtor) case would impair estate and inheritance tax planning in this or any other case was never an issue. Admittedly, Hal Taylor did state that the transfer of title to the Park City home was for estate and inheritance tax planning. However, the issue is not the reason Mr. Taylor gave for the transfer, but whether, "As a practical matter such a rule would prevent transfers of title to the home between spouses to accomplish" estate and inheritance tax planning.

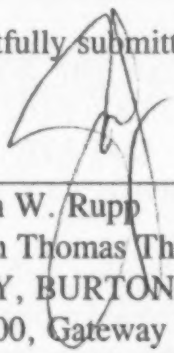
With that issue in mind, there was no evidence that, as a practical matter, a finding and declaration of an equitable

interest in a bankruptcy case would otherwise impair or prevent general estate or inheritance tax planning. Again, the finding of the Court of Appeals comes from no source in this case and demonstrates the appeal court's involvement beyond the scope of appellate review.

VII. CONCLUSION

The Court of Appeals, with no record on appeal, made new findings of fact concerning which no evidence was ever introduced, and ignored findings of the bankruptcy court, beyond the rules of appellate review. Review by this Court is needed to correct the error of law and the Court of Appeals' departure from the rules and limits of appellate review.

Respectfully submitted,



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September 16, 1998